71 FLRA No. 113

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION
U.S. BORDER PATROL, EL PASO SECTOR
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1929
NATIONAL BORDER PATROL COUNCIL
(Union)

0-AR-5340

_____

DECISION

February 26, 2020

_____

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

I. Statement of the Case

Arbitrator Sidney Moreland IV issued an award finding that the Agency violated the parties' agreement when it suspended the grievant. Then, in a separate proceeding, the Arbitrator awarded the Union attorney fees (fee award). The Agency filed exceptions to the fee award, and we must decide whether that award is contrary to law.

The Arbitrator found that the Agency's delay in completing its investigation of the grievant not only violated the parties' agreement, but also constituted "gross procedural error."[1] As such, the Arbitrator determined that an award of attorney fees was warranted in the "interest of justice" under 5 U.S.C. § 7701(g)(1).[2] Because the Agency's investigative delay did not prejudice and burden the grievant to an extent that would qualify as gross procedural error under the guidelines that the Merit Systems Protection Board (MSPB) established in *Allen v. U.S. Postal Service* (*Allen*),[3] we set aside the fee award as contrary to law.

[1] Fee Award at 8.
[2] *Id.* at 9.
[3] 2 M.S.P.R. 420 (1980).

II. Background and Award

In 2012, the grievant "self-reported" [4] that he had engaged in misconduct –specifically, that he had "filed for a change of his wife's immigration status"[5] "counter to immigration procedures."[6]

The Agency conducted an investigation that ultimately lasted approximately two years. Two months after the investigation ended in July 2014, the Agency proposed the grievant's removal. The Agency placed the grievant on administrative duty and suspended his law-enforcement status, pending resolution of the proposed removal. But after the grievant and the Union presented to the Agency's deciding official written and oral replies to the proposed removal, the Agency reduced the removal to a fourteen-day suspension.

The Union filed a grievance contending that the Agency violated the parties' agreement by suspending the grievant without "just and sufficient cause," and by failing to provide him with notice of proposed discipline at "the earliest practical date,"[7] as Article 32, Section G of the parties' agreement required.[8]

The Arbitrator sustained the grievance in an award dated September 11, 2017 (merits award). As relevant here, the Arbitrator found that "[t]he evidence supports a finding of the requisite just and sufficient cause for the [g]rievant's suspension when the substantive merits of the case are viewed."[9] Nevertheless, the Arbitrator found that the Agency "could have reasonably"[10] proposed its discipline of the grievant much earlier, and "demonstrated unacceptable dilatory handling of this matter."[11] The Arbitrator found that this delay, which he characterized as a "wholly procedural" basis for sustaining the grievance,[12] violated Article 32, Section G's requirement that the Agency ensure "expedient discipline handling."[13] He concluded that the Agency acted without just and sufficient cause, and he awarded the grievant make-whole relief.[14] The Agency did not file exceptions to the merits award.

[4] Fee Award at 8.
[5] Exceptions, Attach. 6, Merits Award (Merits Award) at 11.
[6] *Id.* at 4.
[7] *Id.* at 12.
[8] "The employer shall furnish employees with notices of proposed disciplinary/adverse actions at the earliest practicable date after the alleged offense has been committed and made known to the employer . . . ." *Id.* at 7 (quoting Art. 32, § G of the parties' agreement).
[9] *Id.* at 11.
[10] *Id.* at 8.
[11] *Id.* at 10.
[12] *Id.* at 12.
[13] *Id.* at 10; *see also* Fee Award at 6.
[14] Merits Award at 12.

The Union then filed a motion for attorney fees. The Union argued that an award of attorney fees was warranted "in the interest of justice" under § 7701(g)(1)[15] and *Allen*.[16]

In the fee award dated December 6, 2017, the Arbitrator granted the Union's motion and awarded attorney fees.[17] The Arbitrator found that, after investigating for sixty-two days, the Agency then "allowed the matter to sit inactive and dormant."[18] According to the Arbitrator, the Agency's delay included fourteen months during which the Agency waited for a response from the Department of Justice (Justice Department) concerning the grievant's ability to be a witness in immigration proceedings.[19] The Arbitrator noted that the proposal letter stated that "it is very likely that [the grievant's] actions ha[d] the potential of permanently damaging [his] ability to serve as a [g]overnment witness, which is an inherent part of [his] position."[20] Nevertheless, in the Arbitrator's view, the Justice Department's response had "no bearing on the Agency's discipline of the [g]rievant" because the issue that the Agency raised with the Justice Department "[did] not form the basis for the Agency's proposed discipline."[21] The Arbitrator also faulted the proposing official for the amount of time that elapsed between the completion of the Agency's investigation and the furnishing of the proposal letter. In total, the Arbitrator found that "695 days" passed between the grievant's report of his misconduct and the Agency's proposal to remove the grievant.[22]

The Arbitrator also considered the Agency's violation of the grievant's contractual due process rights under Article 32, Section G. Further, the Arbitrator found that "the problematic time delay was immediately obvious" and "glaringly noticeable to the Agency."[23] Based on these considerations, the Arbitrator concluded that the Agency's actions "constitute[d] a gross procedural error" under *Allen*,[24] thereby demonstrating that fees were warranted in the interest of justice under § 7701(g)(1). Although the Union raised other arguments in favor of an attorney-fee award consistent with *Allen*'s guidelines, the Arbitrator did not address those arguments.

The Agency filed exceptions to the fee award on January 4, 2018. The Union filed an opposition to the Agency's exceptions on February 5, 2018.

III. Preliminary Matter: The Agency's exceptions to the merits award are untimely.

In its exceptions to the fee award, the Agency argues that the Arbitrator's interpretation of Article 32, Section G is contrary to management's rights under § 7106(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute)[25] because the fee award imposes a "non-negotiated internal security practice"[26] by limiting the amount of time the Agency may take "to investigate self-reported misconduct."[27] The Agency also argues that the Arbitrator's decision to rescind the discipline is contrary to public policy because it "infringes on the Agency's interest [in] combat[ing] corruption."[28]

These arguments challenge the Arbitrator's decision on the merits of the grievance. However, as noted above, the Agency did not file exceptions to the merits award. And because the time limit for filing exceptions to the merits award had already expired by the date on which the Agency filed its exceptions to the fee award, these exceptions to the merits award are untimely.[29] Therefore, we dismiss them.

[15] Fee Award at 3.
[16] 2 M.S.P.R. 420.
[17] Fee Award at 10.
[18] *Id.* at 6 (quoting Merits Award at 10).
[19] *Id.*
[20] *Id.* (emphasis omitted) (quoting Proposal Letter).
[21] *Id.*
[22] *Id.* at 4 (quoting Merits Award at 8).
[23] *Id.* at 8.
[24] *Id.* at 10.
[25] 5 U.S.C. § 7106(a)(1).
[26] Exceptions Br. at 2.
[27] *Id.*
[28] *Id.* at 6.
[29] 5 C.F.R. § 2425.2(b) (recognizing thirty-day time limit for filing exceptions to arbitration award).

IV. Analysis and Conclusion: The fee award is contrary to the Back Pay Act and § 7701(g)(1).

The Agency argues that the fee award is contrary to the Back Pay Act,[30] which incorporates § 7701(g)(1)'s interest-of-justice standards for attorney-fee awards. Specifically, the Agency argues that its violation of the parties' agreement was not a gross procedural error that warranted an award of attorney fees under the fourth *Allen* category.[31]

After recently examining the Back Pay Act, analyzing the legislative history of the Civil Service Reform Act, and seeking input from the federal labor-management-relations community, the Authority reevaluated its treatment of the MSPB's interest-of-justice guidelines in *Allen*. In *AFGE, Local 2076*[32] and *AFGE, Local 1633*,[33] the Authority held that, although it must adhere to *Allen*'s core tenets, *Allen*'s guidelines, or categories, must be "adapted"[34] to suit the "context" in which the Authority operates[35] – including contractual disputes and disciplinary appeals that do not involve serious adverse actions. We follow that approach here in evaluating the Agency's exception.

Under the fourth *Allen* guideline, in order to prove that an agency committed a "gross procedural error" warranting attorney fees, a party must demonstrate more than "simply 'harmful' procedural error such as suffices to require reversal of the agency action."[36] In *Allen*, the MSPB noted legislative history that discussed gross procedural error as being a situation "where the employee has been dragged through a lengthy and costly legal proceeding while in fact he was *innocent* of the charges when it was some procedural error."[37] Consistent with *Allen*,[38] in assessing whether a gross procedural error has occurred, the MSPB balances the nature of, and any excuse for, the agency's error and the prejudice and burden that error caused the appellant.[39] "If, in the balance, the prejudice and burden to the appellant predominates, gross procedural error exists and the appellant is entitled to a fee award."[40] In this regard, the MSPB specifically requires that "the [procedural] error *must have* resulted in 'prejudice and burden' to the appellant."[41]

The Arbitrator's analysis in the fee award neglected these central concepts of prejudice and burden to the grievant. Indeed, the Arbitrator found that, on the merits alone, the evidence *supported* "a finding of the requisite just and sufficient cause for the [g]rievant's suspension."[42] The Arbitrator sustained the grievance and found no just and sufficient cause for the suspension only for procedural reasons: specifically, because the Agency violated Article 32, Section G by taking too long to investigate the grievant before the Agency proposed his suspension. But the Agency did not place the grievant on administrative duty until it proposed

[30] 5 U.S.C. § 5596.

[31] Exceptions Br. at 5. 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. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Dep't of the Treasury, 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. *U.S. DOD, 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, *id.*, unless a party demonstrates that the findings are deficient as nonfacts. *NAGE, Local R4-17*, 67 FLRA 4, 6 (2012) (citing *U.S. Dep't of the Air Force, Tinker Air Force Base, Okla. City, Okla.*, 63 FLRA 59, 61 (2008)).

[32] 71 FLRA 221 (2019) (Member DuBester concurring, in part, and dissenting, in part).

[33] 71 FLRA 211 (2019) (Member Abbott concurring) (Member DuBester concurring, in part, and dissenting, in part).

[34] *Id.* at 216.

[35] *AFGE, Local 2076*, 71 FLRA at 223.

[36] *Allen*, 2 M.S.P.R. at 435 n.36.

[37] *Id.* at 430 (emphases added). The MSPB also noted that the legislative history gave as an example a situation (albeit in "a totally different context") "where the . . . police put a suspected shoplifter's picture on the police flier among known shoplifters warning all of the merchants . . . against this person who was later tried in the . . . courts and found to be innocent, and under circumstances so compelling he couldn't possibly have been involved." *Id.* at 431.

[38] 2 M.S.P.R. at 435 n.36.

[39] *Baldwin v. Dep't of VA*, 115 M.S.P.R. 413, 420 (2010) (*Baldwin*); *see also McKenna v. Dep't of the Navy*, 108 M.S.P.R. 404, 410 (2008) (*McKenna*); *SSA v. Price*, 94 M.S.P.R. 337, 342 (2003); *Thomas v. U.S. Postal Serv.*, 77 M.S.P.R. 502, 506-07 (1998) (*Thomas*); *McIver v. Dep't of the Interior*, 52 M.S.P.R. 644, 649 (1992) (*McIver*); *Shelton v. OPM*, 42 M.S.P.R. 214, 219 (1989); *Swanson v. Def. Logistics Agency*, 35 M.S.P.R. 115, 118 (1987) (*Swanson*); *Ingram v. Veterans Admin.*, 29 M.S.P.R. 641, 646 (1986); *Poole v. Dep't of the Army*, 20 M.S.P.R. 355, 356 (1984) (*Poole*); *Jacobson v. Dep't of the Army*, 6 M.S.P.R. 106, 109 (1981) (*Jacobson*).

[40] *Baldwin*, 115 M.S.P.R. at 420-21; *see also McKenna*, 108 M.S.P.R. at 410; *Swanson*, 35 M.S.P.R. at 118.

[41] *McKenna v. Dep't of the Navy*, 104 M.S.P.R. 22, 25 (2006) (emphasis added) (quoting *Swanson*, 35 M.S.P.R. at 118)); *Poole*, 20 M.S.P.R. at 356-57 (finding no gross procedural error where "appellant offered no evidence or argument to support the allegation that he was severely prejudiced"); *Jacobson*, 6 M.S.P.R. at 109 (finding no gross procedural error where appellant was not "prejudiced by the agency's error"); *Wright v. Dep't of the Army*, 5 M.S.P.R. 216, 218 (1981) (reversing presiding official's finding of gross procedural error because "[t]here was no record evidence showing that the agency committed a 'gross procedural error' which severely prejudiced the appellant, who ultimately suffered no loss of pay because the action was reversed by the presiding official").

[42] Merits Award at 11.

disciplining him, which means that the Agency's prolonged investigation did not exacerbate any negative effects that administrative-duty status had on the grievant. Ironically, it appears that, in the end, the grievant benefited from any delay because, absent that delay, the Arbitrator strongly suggested that he would have found just and sufficient cause to sustain the grievant's suspension.[43]

As the Arbitrator noted, much of the delay resulted from seeking advice from the Justice Department on the grievant's possible impairment as a witness in immigration proceedings.[44] The Arbitrator faulted the Agency for waiting on that advice because, according to the Arbitrator, the grievant's impairment as a witness did "not form the basis for the Agency's proposed discipline."[45] However, that conclusion conflicts with the Arbitrator's finding that the proposal letter expressly referred to the grievant's potential future impairment as a witness as one of the Agency's considerations.[46] Most importantly, the Arbitrator did not find that the Agency's delay while corresponding with the Justice Department prejudiced and burdened the grievant. For example, the Arbitrator did not find that, if the Agency had proposed the grievant's removal fourteen months sooner, the grievant would have been any less responsible for his *admitted* misconduct.

For the foregoing reasons, we find that the length of the Agency's investigation did not cause the grievant to suffer prejudice and burden within the meaning of the MSPB's precedent on gross procedural error.[47]

Regarding the Arbitrator's assertion that the Agency's delay impaired the grievant's due-process rights, we note that the grievant and his Union attorney were afforded the opportunity to respond to the proposed removal. And, once they did so, the Agency reduced the proposed removal to a fourteen-day suspension.[48] Thus, the grievant's exercise of his due-process rights successfully resulted in the Agency's mitigation of his penalty. And there were no findings that would support a conclusion that the investigative delay infringed upon the grievant's due-process rights in a manner that constituted gross procedural error.[49]

[43] *Id.*; *cf. Lampack v. U.S. Postal Serv.*, 29 M.S.P.R. 654, 658 n.6 (1986) (finding that agency's actions did not constitute "gross procedural error" when they "prejudiced the agency and not the appellant").
[44] Fee Award at 6.
[45] *Id.*
[46] *Id.*

[47] *See, e.g.*, *Baldwin*, 115 M.S.P.R. at 421-22 (appellant relied on misinformation provided by agency that ultimately required him to file an MSPB appeal in order to have his "resignation" deemed involuntary so as to preserve his (ultimately successful) statutory right to appeal the separation, especially where agency, upon realization of its error, (1) did not correct – or inform the appellant of – its mistake, and (2) benefitted from its known error in opposing appellant's appeal); *McKenna*, 108 M.S.P.R. at 410-11 (agency's failure to forward appellant's resume and other information to agency's reduction-in-force (RIF) team prejudiced appellant's substantive entitlement under the RIF); *Thomas*, 77 M.S.P.R. at 507 (agency's action prejudiced appellant's substantive RIF rights); *Mercer v. Dep't of HHS*, 42 M.S.P.R. 115, 121-22 (1989) (evidence showed that appellant might not have been removed if he had been afforded a pre-decision hearing or advisory arbitration); *Coltrane v. Dep't of the Army*, 32 M.S.P.R. 6, 9 (1986) (agency's failure in the proposal and decision notices to give appellant sufficient factual specificity of the allegations she must refute or acts she must justify impaired her ability to defend against agency's action and prolonged the proceeding); *McInville v. U.S. Postal Serv.*, 31 M.S.P.R. 297, 301 (1986) (agency failed to provide appellant with proper notice of the proposed action; when appellant informed agency that he had not received the notice of proposed action, agency denied his request for an extension of time in which to reply to the charges, even though his request was made before the effective date of the action; and, had appellant been provided an opportunity to reply to the charges, he could have articulated the defense he presented at the MSPB hearing).
[48] Merits Award at 5-6.
[49] *See* Fee Award at 8-9 (finding that the Agency's violation of contractual procedural requirements necessarily meant that the grievant was deprived of due process amounting to a gross procedural error); *McIver*, 52 M.S.P.R. at 649-50 (no gross procedural error where agency allegedly failed to follow its own personnel procedures, but employee "failed to allege any burden or harm that any such errors caused him"); *Mitchell v. Dep't of the Navy*, 51 M.S.P.R. 103, 114-15 (1991) (no gross procedural error where agency allegedly failed to provide employee with notice of constructive suspension and opportunity to respond, but employee failed to show that the agency's procedural error was "likely to have had a harmful effect upon the outcome of the case before the agency").

Accordingly, we set aside the Arbitrator's finding that attorney fees are warranted on the basis of a gross procedural error, as contrary to the Back Pay Act and § 7701(g)(1).

We also find the record sufficient to determine whether the Union is entitled to attorney fees under the other *Allen* categories that the Union raised below.[50] Because the Agency's delay in imposing discipline was not a "prohibited personnel practice," the Union is not entitled to attorney fees under the first *Allen* category.[51] Further, we do not find that the Agency "knew or should have known that it would not prevail on the merits,"[52] where, as here, the Arbitrator found that the Agency had just cause for its suspension of the grievant *but for* its "wholly procedural" contractual violation.[53] Thus, attorney fees are not warranted in the interest of justice.[54]

In sum, we set aside the fee award in its entirety.[55]

V. Decision

We dismiss the Agency's arguments challenging the merits awards, grant the Agency's contrary-to-law exception to the fee award, and set aside the fee award.

[50] Exceptions, Attach. 5, Union's Motion for Attorney Fees at 9 (asserting that the Union is entitled to attorney fees under the first and fifth *Allen* categories); *see AFGE, Council 220*, 61 FLRA 582, 585-87 (2006) (where award and record allowed Authority to resolve attorney-fee dispute, Authority conducted its own assessment of whether union satisfied applicable *Allen* factors).

[51] *Connor v. U.S. Postal Serv.*, 50 M.S.P.R. 389, 395 (1991) (upholding administrative judge's finding that "delays alone did not support a finding of a prohibited personnel practice"); *see also U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Tucson, Ariz.*, 64 FLRA 819, 821 (2010) (holding that a violation of a collective-bargaining agreement is not necessarily a "prohibited personnel practice").

[52] *AFGE, Local 2076*, 71 FLRA at 223-24 (discussing the "knew or should have known" category under *Allen* and noting that the MSPB's decision in *Lambert v. Department of the Air Force*, 34 M.S.P.R. 501 (1987), does not apply to an "arbitrator['s] mitigat[ion of] a minor disciplinary action").

[53] Merits Award at 12.

[54] For the Authority's recent, extended reexamination of the *Allen* factors, see *AFGE, Local 2076*, 71 FLRA 221, and *AFGE, Local 1633*, 71 FLRA 211. *See also U.S. DHS, U.S. CBP*, 70 FLRA 73, 76 (2016) (upholding arbitrator's finding that agency's failure to issue disciplinary notice "at the earliest practicable date" did not, by itself, show that agency knew or should have known that it would not prevail on the merits); *NAIL, Local 5*, 69 FLRA 573, 577 (2016) (upholding arbitrator's finding that "unreasonable delay" in violation of collective-bargaining agreement did not, standing alone, show that the agency knew or should have known that it would not prevail on the merits).

[55] Accordingly, we find it unnecessary to reach the Agency's remaining arguments.

Member DuBester, dissenting:

I disagree with the majority's conclusion that the fee award is contrary to law. Unlike the majority, I would defer to the Arbitrator's unchallenged factual findings. And applying relevant Merit Systems Protection Board (MSPB) precedent, I would find that the Arbitrator did not err by concluding that the Agency's violation of the parties' collective-bargaining agreement amounted to gross procedural error warranting fees under *Allen v. U.S. Postal Service* (*Allen*).[1]

The Arbitrator found that the Agency allowed 695 days to pass after the grievant self-reported his conduct before giving the grievant notice of his proposed removal. He further found that the Agency offered no legitimate excuse for its delay.

On this point, the Arbitrator determined that, although the Agency's investigation was effectively over in sixty-two days, it let the matter "needlessly linger[]," waiting for a response from the U.S. Department of Justice (DOJ) on an issue that "[did] not form the basis for the Agency's proposed discipline, and [that] could have . . . been stated . . . without waiting over [fourteen] months for . . . [an] ambiguous [reply]."[2] And he found that because the Agency's investigation, including the question submitted to DOJ, "revealed little more than what the [g]rievant had self-reported," the Agency had no reason to wait nearly three months to issue the proposal letter after it had already prolonged the investigation for twenty months.[3]

The Arbitrator also found that this excessive delay was "immediately obvious and/or glaringly noticeable" to the Agency, and demonstrated "a tangible disconnect from the Agency's contractual time line requiring expedient discipline handling."[4] Based on these findings, he concluded that the Agency's delay in proposing the discipline violated Article 32, Section G of the parties' agreement, which requires the Agency to provide employees with notice of proposed discipline "as soon as practical."[5] As the Arbitrator's findings on these matters are unchallenged, I would defer to them.[6]

In order to prove that an agency committed a gross procedural error warranting an award of attorney fees under the fourth *Allen* factor, a party must establish that the error "prolonged the proceeding[] *or* severely prejudiced the employee[]."[7] To determine entitlement to fees under this factor, the MSPB applies a balancing test which weighs the nature of, and any excuse for, the agency's error and the prejudice and burden that error caused the grievant.[8]

Here, the Arbitrator rejected the Agency's reasons for its "unacceptable dilatory handling" of the matter,[9] further concluding that the grievant's "self-report[ing]" of his misconduct did not "vitiate" his contractual right to due process.[10] And he found that the Agency's violation of the grievant's contractual rights caused him to needlessly endure almost two years of uncertainty.[11] Balancing the Agency's unjustified delay in proposing the grievant's discipline against the burden these actions placed on the grievant, the Arbitrator concluded that the Agency's violation of the parties' agreement "constitute[d] a gross procedural error."[12]

This conclusion is consistent with MSPB precedent finding gross procedural error under similar circumstances.[13] I would therefore conclude that the Arbitrator did not err in awarding attorney fees under the fourth *Allen* factor.

Accordingly, I dissent.

---

[1] 2 M.S.P.R. 420 (1980).

[2] Fee Award at 5-6. The majority states that the Arbitrator's finding that the issue submitted to DOJ did not form the basis for the proposed discipline conflicts with his statement that the proposal letter referenced the issue. Majority at 6. However, the Arbitrator quoted a phrase from the proposal letter, with no context, and the proposal letter is not part of the record. Therefore, the majority's conclusion that the Arbitrator's findings are contradictory is without basis in the record. In any event, the Agency did not challenge the Arbitrator's finding as a nonfact.

[3] Fee Award at 6.

[4] *Id.* at 5-6, 8-9.

[5] *Id.* at 8; *see also* Exceptions, Attach. 6, Merits Award at 7 ("The employer shall furnish employees with notice of proposed disciplinary/adverse actions at the earliest practicable date after the alleged offense has been committed and made known to the employer . . . ." (quoting Art. 32, § G)).

[6] *U.S. Dep't of Transp., FAA*, 68 FLRA 402, 404-05 (2015) (citing *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 106 (2012)) (Authority defers to an arbitrator's unchallenged factual findings).

[7] *Allen*, 2 M.S.P.R. at 435 (emphasis added).

[8] Majority at 5 (citations omitted).

[9] Fee Award at 5-6.

[10] *Id.* at 8.

[11] *Id.* at 6. *But see* Majority at 6 (finding that the grievant was not prejudiced merely because he was not placed on administrative leave during the prolonged investigation).

[12] Fee Award at 10.

[13] *Aubrey v. Dep't of the Navy*, 27 M.S.P.R. 65, 66 (1985) (finding that a two-and-a-half-year delay in bringing charges against an employee amounted to "gross procedural error which severely prejudiced" the appellant because the agency offered no legitimate excuse for the delay and the delay was contrary to the agency's own internal regulations).