

72 FLRA No. 89

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3307
NATIONAL BORDER PATROL COUNCIL
(Union)

0-AR-5688

DECISION

September 8, 2021

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

I. Statement of the Case

In this case, we remind the federal labor-relations community that an award of attorney fees under the Back Pay Act must be in the “interest of justice” under 5 U.S.C. § 7701(g)(1).¹ Specifically at issue in this case is whether the Union was entitled to attorney fees simply because the Arbitrator found that the Agency violated a provision of the parties’ collective-bargaining agreement.

Arbitrator Almalee P. Guttschall issued an award sustaining the Union’s request for attorney fees based, in part, on Agency management having reduced the grievant’s suspension from seven to two days. The Arbitrator found that the reduction of the suspension showed that the Agency initiated the suspension in bad faith and knew, or should have known, that it would not prevail on the merits.

On exceptions, the Agency argued that the award of attorney fees was contrary-to-law and based on nonfacts. We grant the contrary-to-law exception

¹ See 5 U.S.C. § 5596; *AFGE, Loc. 446*, 71 FLRA 1020 (2020) (then-Member DuBester concurring); see also *Allen v. U.S. Postal Service*, 2 M.S.P.R. 420, 427 (1980) (*Allen*).

because the Arbitrator’s application of the *Allen v. U.S. Postal Service (Allen)* factors² was inconsistent with Authority precedent.

II. Background & Arbitrator’s Awards

Two months after the Agency became aware of the grievant’s alleged misconduct, it began an inquiry that triggered an investigation. During the three-month investigation, the grievant admitted to the alleged charges. Nearly two additional months after the Agency concluded its investigation, the Agency proposed a seven-day suspension based upon three charges: the grievant left before the end of his assigned shift; the grievant failed to provide accurate information for the Agency’s timesheet; and the grievant failed to follow supervisor instructions. Ultimately, the Agency reduced the grievant’s seven-day suspension to two days.

The Union grieved the suspension and asserted that the Agency violated Article 32(G) of the parties’ agreement (Article 32(G)). Article 32(G) states, in relevant part, that the Agency “shall furnish employees with notices of proposed disciplinary/adverse actions at the earliest practicable date.”³

The matter went to arbitration where the Arbitrator found that although the grievant “was lying and taking payment he had not earned,”⁴ and the Agency proved all three charges, there was no just cause for his suspension because of the Agency’s unjustified delays. Although the Arbitrator found that the delays neither prejudiced nor burdened the grievant, the Arbitrator found that the Agency violated Article 32(G) when it did not provide the grievant with notice of the proposed discipline at the “earliest practicable date.”⁵ As a remedy, the Arbitrator found that the Agency should compensate the grievant for the days that it suspended him, restore any benefits he lost, and expunge his record.

The Union subsequently filed a motion arguing that an award of attorney fees was warranted in the

² *Allen* provides illustrative criteria for determining whether an award of attorney fees is in “the interest of justice.” 2 M.S.P.R. at 434-35. Under *Allen*, an award of attorney fees is warranted in the interest of justice if: (1) the agency engaged in a prohibited personnel practice; (2) the agency’s action was clearly without merit, or was wholly unfounded, or the employee is substantially innocent of the charges brought by the agency; (3) the agency initiated the action against the employee in bad faith; (4) the agency committed a gross procedural error which prolonged the proceeding or severely prejudiced the employee; or (5) the agency knew or should have known it would not prevail on the merits when it brought the proceeding. *Id.*

³ Award at 3.

⁴ *Id.* at 21.

⁵ *Id.* at 3.

interest of justice under *Allen*. Specifically, the Union argued that the Agency's violation of Article 32(G) established that the Agency engaged in a prohibited personnel practice, initiated the disciplinary action in bad faith, committed a gross procedural error that prolonged the proceeding, and knew or should have known that it would not prevail on the merits.⁶

The Arbitrator issued a supplemental award addressing attorney fees (fee award). In applying the *Allen* factors, the Arbitrator first rejected the Union's argument that the Agency committed a prohibited personnel practice.⁷ Next, the Arbitrator considered whether the Agency acted in bad faith. She emphasized that the Agency reduced its proposed suspension from seven to two days notwithstanding the seriousness of the grievant's charges. According to the Arbitrator, the decision to reduce the grievant's suspension was "only comprehensible if [the Agency] recognized [that the] decision would be overturned in arbitration," which, the Arbitrator said, made it "plain that the Agency acted in bad faith."⁸ The Arbitrator found that the same analysis established that the Agency knew or should have known that it would not prevail on the merits. Because the Arbitrator found that the Agency acted in bad faith and knew or should have known that it would not prevail on the merits, the Arbitrator granted the Union's motion for attorney fees.

The Agency filed exceptions to the fee award on December 14, 2020, and the Union filed its opposition on January 13, 2021.

III. Analysis and Conclusions

The Agency argues that the fee award is contrary to the Back Pay Act,⁹ which incorporates § 7701(g)(1)'s interest-of-justice standard for attorney-fee awards.¹⁰ Specifically, the Agency argues that neither its violation of the parties' agreement nor its reduction of the suspension establishes that the Agency acted in bad faith, committed a gross procedural error, or knew or should have known it would not prevail on the merits of the disciplinary action.¹¹

When considering contrary-to-law claims,¹² the Authority assesses whether the arbitrator's legal

conclusions are consistent with the applicable standard of law.¹³ In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts.¹⁴

As relevant here, a prerequisite for an award of attorney fees under § 7701(g)(1) is that the award of attorney fees must be in the interest of justice.¹⁵ *Allen*'s illustrative criteria for determining whether fees are in the interest of justice include whether (1) the agency engaged in a prohibited personnel practice; (2) 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) the agency initiated the action against the employee in bad faith; (4) the agency committed a gross procedural error which prolonged the proceeding or severely prejudiced the employee; or (5) the agency knew or should have known that it would not prevail on the merits when it brought the proceeding.¹⁶ In resolving whether an arbitrator properly applied the *Allen* interest-of-justice factors, the Authority looks to the decisions of the Merit Systems Protection Board (MSPB) and the United States Court of Appeals for the Federal Circuit.¹⁷

A. The Agency did not act in bad faith.

An agency initiates an action in bad faith where the action was brought to "harass" the employee or to

2429.5 (the Authority will not consider arguments that could have been but were not raised before the arbitrator). However, the evidence shows that the Agency argued before the Arbitrator that the *Allen* factors were not met in this case, and that the Agency acted in good faith, did not commit a gross procedural error, and neither knew nor should have known that it would not prevail on the merits. *See* Exceptions, Attach. 2, Agency's Resp. to Union's Mot. for Att'y Fees at 3-6. As the Agency raised its arguments to the Arbitrator, we consider them.

¹³ *See AFGE, Loc. 2145*, 70 FLRA 873, 874 (2018).

¹⁴ *NLRB*, 72 FLRA 334, 338 (2021) (citing *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014)).

¹⁵ *See Allen*, 2 M.S.P.R. at 427; *AFGE, Loc. 2338*, 72 FLRA 216, 217 (2021) (Chairman DuBester concurring).

¹⁶ *Allen*, 2 M.S.P.R. at 434-35.

¹⁷ *AFGE, Loc. 1923*, 66 FLRA 22, 23 (2011) (Member Beck dissenting). The Authority has recently held that, although it "must adhere to *Allen*'s core tenets, *Allen*'s guidelines, or categories, must be adapted" to suit the context in which the Authority operates – including contractual disputes and disciplinary appeals that do not involve serious adverse actions. *U.S. DHS, CBP, U.S. Border Patrol, El Paso Sector*, 71 FLRA 597, 599 (2020) (*CBP El Paso*) (then-Member DuBester dissenting) (citing *AFGE, Loc. 2076*, 71 FLRA 221 (2019) (*Loc. 2076*) (then-Member DuBester concurring, in part, and dissenting, in part); *AFGE, Loc. 1633*, 71 FLRA 211 (2019) (Member Abbott concurring; then-Member DuBester concurring in part and dissenting in part)). We follow that approach here in evaluating the Agency's exceptions.

⁶ Exceptions, Attach. 3, Union's Mot. for Att'y Fees (Mot. for Att'y Fees) at 6-9.

⁷ Fee Award at 5, 11.

⁸ *Id.* at 11-12.

⁹ Exceptions Br. at 10 (citing 5 U.S.C. § 5596(b)(1)(A)(ii)).

¹⁰ 5 U.S.C. § 7701(g)(1).

¹¹ Exceptions Br. at 10-15.

¹² The Union argues that the Agency failed to raise its contrary-to-law arguments in its response to the Union's attorney-fee motion. Opp'n at 4; *see* 5 C.F.R. §§ 2425.4(c) and

“exert improper pressure on the employee to act in certain ways.”¹⁸

The Arbitrator found that the Agency brought the disciplinary action in bad faith because the reduction of the grievant’s suspension was “only comprehensible if [Agency] officials recognized [that their] decision would be overturned in arbitration.”¹⁹ However, the Union did not present any specific evidence before the Arbitrator to support the claim that the Agency acted in bad faith in this case.²⁰ The Union does not allege, and the record does not indicate, that the Agency proposed suspending the grievant to “harass” him or to “exert improper pressure on [him] to act in certain ways.”²¹ Further, the Arbitrator’s finding that the grievant “was lying and taking payment he had not earned”²² undermines any notion that the Agency brought the disciplinary action for improper reasons.²³

Accordingly, we set aside the Arbitrator’s finding that attorney fees are warranted in the interest of justice based on any alleged bad faith by the Agency.²⁴

B. The Agency neither knew nor should have known that it would not prevail on the merits.

The “knew or should have known” standard requires an evaluation of the evidence that was available to the agency at the time of the imposed discipline.²⁵ In *U.S. DHS, CBP, U.S. Border Patrol, El Paso Sector (CBP El Paso)*,²⁶ the Authority applied this standard in the context of a similar Article 32(G) violation.²⁷ In *CBP El Paso*, the Authority stated: “we do not find that the [a]gency knew or should have known that it would not prevail on the merits, where . . . the [a]rbitrator found that the [a]gency had just cause for its suspension of the

grievant *but for* its . . . procedural contractual violation.”²⁸

Here, the Arbitrator found that the Agency’s violation of Article 32(G) and reduction of the grievant’s suspension from seven to two days established that the Agency knew that it would not prevail on the merits when it disciplined the grievant.²⁹ According to the Arbitrator, the reduction was “only comprehensible if [Agency] officials recognized [that the] decision would be overturned in arbitration.”³⁰ However, the grievant’s admitted guilt, paired with the Arbitrator’s finding that the grievant lied and took payment he had not earned, rebuts the Arbitrator’s determination that the Agency knew or should have known that it would not prevail on the merits.³¹

Therefore, consistent with *CBP El Paso*, we set aside the Arbitrator’s finding that attorney fees are warranted because the Agency knew nor should have known that it would not prevail on the merits.³²

¹⁸ *Allen*, 2 M.S.P.R. at 434-35.

¹⁹ Fee Award at 11-12.

²⁰ Mot. for Att’y Fees at 7 (arguing that Agency acted in bad faith because arbitrator had previously sustained grievance in a different case involving Agency’s violation of Article 32(G)).

²¹ *Allen*, 2 M.S.P.R. at 434-35.

²² Award at 21.

²³ See *id.* at 18 (noting, in regard to the reasonableness of a two-day suspension, that “a reasonable arbitrator might well conclude that because of the seriousness of the offenses, the penalty was *too small*” (emphasis added)).

²⁴ See *AFGE, Council 220*, 61 FLRA 582, 586 (2006) (citing *U.S. Dep’t of VA, Med. Ctr., Coatesville, Pa.*, 56 FLRA 966, 971 (2000)).

²⁵ *U.S. DHS, U.S. CBP*, 70 FLRA 73, 76 (2016) (*DHS*).

²⁶ 71 FLRA 597.

²⁷ *Id.* at 597 & n.8 (arbitrator sustained grievance challenging suspension only because agency violated obligation to propose discipline “at the earliest practicable date” under Article 32(G)).

²⁸ *Id.* at 601 (internal quotation marks omitted) (citing *Loc. 2076*, 71 FLRA at 223-24).

²⁹ Fee Award at 11-12.

³⁰ *Id.*

³¹ See Award at 21; see also Fee Award at 2 (stating that the Agency had proved that the grievant committed the offense, a nexus existed between the misconduct and the efficiency of the service, and the penalty was reasonable).

³² See 71 FLRA at 601 (citing *DHS*, 70 FLRA at 76 (upholding arbitrator’s finding that the wide disparity in arbitration awards applying Article 32(G) meant that the agency “could not have known how the [a]rbitrator, or any arbitrator, would have viewed [a particular] disciplinary proceeding”)).

C. The Agency did not commit a gross procedural error.

We also find the record sufficient to determine whether the Union is entitled to attorney fees under the only remaining *Allen* factor.³³ The Union alleged before the Arbitrator that the Agency committed a gross procedural error which prolonged the proceeding or severely prejudiced the grievant.³⁴ 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;” gross procedural errors include those errors sufficient to require reversal of the agency action.³⁵ To assess this standard, the MSPB balances the nature of, and any excuse for, the agency’s error against the prejudice and burden that error caused the appellant.³⁶ If the prejudice and burden to the appellant predominates, then gross procedural error exists and the appellant is entitled to a fee award.³⁷ The MSPB specifically requires that “the [procedural] error must have resulted in ‘prejudice and burden’ to the appellant.”³⁸ And 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.”³⁹

Again, *CBP El Paso* is instructive. There, the Authority considered a similar Article 32(G) violation and found that a 695-day delay did not constitute gross procedural error.⁴⁰ In so holding, the Authority emphasized that even if the agency had proposed the grievant’s discipline sooner, the grievant would not “have been any less responsible for his admitted misconduct,” so the length of the investigation “did not cause the grievant to suffer prejudice and burden.”⁴¹

In the case presently before us, the Union’s motion for attorney fees neglected these central concepts of prejudice and burden to the grievant and equated the Agency’s violation of Article 32(G) with a finding of

gross procedural error.⁴² Despite the Union’s assertion to the contrary,⁴³ the Arbitrator’s finding that the Agency did not furnish the grievant with notice of his discipline “as soon as practicable”⁴⁴ does not automatically equal a gross procedural error.⁴⁵

The Arbitrator did not find that the Agency’s four-month delay in disciplining the grievant prejudiced and burdened the grievant.⁴⁶ Here the grievant was neither dragged through a “lengthy and costly legal proceeding”⁴⁷ nor was he “innocent of the charges”;⁴⁸ in fact, the grievant admitted to the charges alleged by the disciplinary action.⁴⁹ Further, the grievant’s four-month delay is far less than the 695-day delay in *CBP El Paso*, which the Authority found was insufficient to establish gross procedural error.⁵⁰

For the foregoing reasons, we find that the Agency’s violation of Article 32(G) did not cause the grievant to suffer prejudice and burden amounting to gross procedural error.

In sum, attorney fees are not warranted in the interest of justice, and we set aside the fee award as contrary to the Back Pay Act.⁵¹

IV. Decision

We grant the Agency’s contrary-to-law exception and set aside the fee award in its entirety.

³³ *E.g., id.* (after setting aside arbitrator’s findings that attorney fees were warranted under certain *Allen* factors, Authority found record sufficient to determine whether the union was entitled to attorney fees under the other *Allen* factors at issue). Here, the Union never alleged the second *Allen* factor and did not file exceptions to the Arbitrator’s finding that the first *Allen* factor does not apply. *See* Mot. for Att’y Fees at 6-7; *see also Allen*, 2 M.S.P.R. at 434-35.

³⁴ Mot. for Att’y Fees at 8.

³⁵ *CBP El Paso*, 71 FLRA at 599.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 600.

⁴² *See* Mot. for Att’y Fees at 8.

⁴³ *Id.*

⁴⁴ *See* Fee Award at 5-12; Award at 21.

⁴⁵ *See CBP El Paso*, 71 FLRA at 600.

⁴⁶ *See* Award at 21.

⁴⁷ *CBP El Paso*, 71 FLRA at 599 (quoting *Allen*, 2 M.S.P.R. at 430).

⁴⁸ *Id.* (quoting *Allen*, 2 M.S.P.R. at 430).

⁴⁹ *See* Award at 10 (describing grievant’s admissions of alleged misconduct).

⁵⁰ *CBP El Paso*, 71 FLRA at 600.

⁵¹ The Agency also argues that the fee award is based on nonfacts. Exceptions Br. at 6. Because we set aside the fee award on other grounds, we do not reach this exception. *See U.S. Dep’t VA, Boise Veterans Admin., Med. Ctr.*, 72 FLRA 124, 129 (2021).

Chairman DuBester, concurring:

I agree that there is insufficient evidence to support a finding that the Agency acted in “bad faith” for purposes of entitling the Union to attorney fees.¹ And while I continue to disagree with the majority’s decision in *U.S. DHS, CBP, U.S. Border Patrol, El Paso Sector*,² I agree that the Arbitrator did not make sufficient findings to warrant a conclusion that the Agency committed a gross procedural error.

Additionally, for the reasons I have previously explained, I disagree with the majority’s decision in *AFGE, Local 2076*³ to modify the standard governing whether attorney fees are warranted under *Allen* category (5), which examines whether the agency knew or should have known that it would not prevail on the merits when it brought the proceeding.⁴ Under the circumstances of this case, however, I agree that there is no basis for finding that the Agency “knew or should have known” that it would not prevail on the merits when it disciplined the grievant.

Accordingly, I concur in the decision to set aside the award of attorney fees.

¹ Majority at 5.

² 71 FLRA 597 (2020) (then-Member DuBester dissenting) (concluding that a 695-day delay did not constitute gross procedural error).

³ 71 FLRA 221 (2019) (then-Member DuBester concurring in part and dissenting in part).

⁴ *Id.* at 224 (Dissenting Opinion of then-Member DuBester) (noting that, “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”).

Member Abbott, concurring:

I agree with our decision that the Agency neither knew or should have known that it would not prevail on the merits of the grievance. Therefore, the Agency's contrary-to-law exception is properly granted.

I find it necessary to write separately because it seems axiomatic to me that arbitrators who intend to hear and rule on disputes submitted to arbitration between Federal unions and agencies need to be thoroughly familiar with Title V. The decision and award in this case, however, indicates that Arbitrator Guttshall is thoroughly unfamiliar with, or simply chose to ignore, the fundamental disciplinary process and procedures set out in Title V and the regulations which implement them. There is no other conclusion – it is one or the other.

It is quite a basic proposition that Congress established a two-part disciplinary process. A disciplinary action is *proposed* by one level of management (the *proposing official* - generally a first-line supervisor or other management official), and then a final decision is made by another level of management (the *deciding official* - generally a higher-level supervisor or responsible management official). The second step of the disciplinary process assures that an employee who has discipline proposed against them has both the opportunity to respond to the proposed charge[s] and penalty as well as a second level of review. It is not at all uncommon for the deciding official to modify the charges or penalty imposed by the proposing official when they apply the factors established by *Douglas v. Veterans Administration (Douglas)*,* a list of factors established by a seminal ruling of the Merit Systems Protection Board (MSPB) that are to be weighed by the deciding official and may call for the penalty to be mitigated or enhanced.

From a public policy perspective, the process established by Congress would be seriously undermined if arbitrators were free to count a mitigation that occurs during that process as a concession that it would not succeed on the merits. But that is precisely what occurred here. Whether Arbitrator Guttshall was unaware of, or simply ignored, the process established by Congress, the award undermines that process and the application of the MSPB's *Douglas* factors. As such, the award is contrary to law.

Federal employees, unions, and agencies deserve better from the arbitrators they choose to resolve disputes concerning employee discipline.

* 5 M.S.P.R. 280, 305 (1981).