

72 FLRA No. 95

UNITED STATES
DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMPENSATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2513
NATIONAL COUNCIL OF FIELD LABOR LOCALS
(Union)

0-AR-5654

DECISION

September 30, 2021

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

I. Statement of the Case

After issuing a merits award mitigating the grievant's ten-day suspension to a written reprimand, Arbitrator Howard J. Stiefel issued a fee award granting the Union's costs and seventy-five percent of the Union's requested attorney fees (initial award). Subsequently, the Arbitrator awarded additional attorney fees and costs that the Union requested for preparing a response to the Agency's opposition to the fee petition (supplemental award). The Agency challenges both awards on contrary-to-law grounds. We find that the Agency's exceptions to the initial award concerning the Arbitrator's application of the factors set out in *Allen v. U.S. Postal Service (Allen)*¹ do not demonstrate that the initial award is contrary to law, and we deny them.

We further find that the Arbitrator had jurisdiction to award additional fees, and therefore deny the Agency's contrary-to-law exception to the supplemental award, in part. However, because the Arbitrator failed to make the specific findings to support the supplemental award, the award is contrary to law, in part. Accordingly, we set aside the supplemental award and remand the matter to the parties for resubmission to the Arbitrator.

¹ 2 M.S.P.R. 420 (1980).

II. Background and Arbitrator's Award

As relevant here, the Union challenged the grievant's ten-day suspension on the basis that the Agency did not have just cause to discipline her and did not use progressive discipline. The Arbitrator found that the grievant had behaved inappropriately, but that the suspension was not a reasonable penalty because the Agency failed to consider numerous mitigating factors. Consequently, he directed the Agency to mitigate the suspension to a written reprimand, update the grievant's personnel record to reflect this change, and pay any corresponding backpay. The Arbitrator retained jurisdiction to resolve attorney fees issues. Neither party filed exceptions to the merits award.

Subsequently, the Union filed a petition for attorney fees and costs, which the Agency opposed. As part of its response (response) to the Agency's opposition to the fee petition, the Union indicated that it "seeks to adjust the attorney fees to account for and reflect the time spent on this filing."²

The Arbitrator issued the initial fee award on June 19, 2020. He found that the Agency committed an unjustified or unwarranted personnel action when it suspended the grievant instead of reprimanding her. He further determined that the Union was the prevailing party, and that an award of attorney fees and costs would be in the interest of justice under the fifth *Allen* factor³ because the Agency knew or should have known that the ten-day suspension would be excessive under the circumstances. To support this conclusion, the Arbitrator relied on his findings that: (1) there were discrepancies in the evidence upon which the Agency relied; (2) it was undisputed that the grievant had not made any threats or used profanity; (3) the Agency had failed to consider that the misconduct had not become known outside the Agency or had any effect on employees within the Agency; and (4) the Agency failed to consider that the grievant had never received any prior discipline or whether lesser discipline might be appropriate.⁴

² Exceptions, Attach. F, Union Resp. Final Submission (Resp.) at 48.

³ In *Allen*, the Merits Systems Protection Board identified five factors 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. *Allen*, 2 M.S.P.R. at 434-35.

⁴ Initial Award at 23.

However, the Arbitrator reduced the Union's requested fees by twenty-five percent.⁵

The initial award did not address the Union's request for additional fees for preparing the response. However, on the same day the Arbitrator issued the initial award, the Union emailed him asking that he address this request.⁶ The Arbitrator responded that he had not included the time spent on the response in the initial fee award because he "did not know the amount of time involved."⁷ But he further stated that "[a]ssuming a reasonable number of hours expended and no objections in that regard on the part of the Agency, the Union is awarded [seventy-five percent]" of the fee requested for the response.⁸

The Union subsequently submitted its additional fee schedule.⁹ The Agency objected to the Union's request for additional attorney fees, in part, on the basis that the request was untimely. On June 25, 2020, in the supplemental award, the Arbitrator rejected the Agency's objections and granted the Union's request for additional attorney fees for the response.¹⁰ The Arbitrator reasoned that his retention of jurisdiction to resolve attorney fees, the Union's indication in its response that it would be amending the fee petition to account for time spent on the response, and the lack of any prejudice to the Agency all supported treating the amended fee petition as timely.¹¹

On July 16, 2020, the Agency filed exceptions to both fee awards. On August 24, 2020, the Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusions

A. The initial fee award is not contrary to law.

The Agency argues that the initial fee award is contrary to the Back Pay Act¹² (the Act) and 5 U.S.C. § 7701(g)(1) for several reasons. The Authority reviews

questions of law raised by the exceptions de novo.¹³ In applying a standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law, based on the underlying factual findings.¹⁴ In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are based on nonfacts.¹⁵

The Agency first argues that the Arbitrator erred in finding fees warranted under the fifth *Allen* factor because he failed to analyze whether the Agency acted unreasonably in imposing the penalty, and instead based his conclusion solely on his mitigation of the penalty.¹⁶ We disagree.

The Authority has explained that in disciplinary actions, where the agency prevails on the charges but the penalty is mitigated, an award of fees may be warranted in the interest of justice under the fifth *Allen* factor if the agency knew or should have known that its choice of penalty would not be sustained.¹⁷ As the Agency notes, mitigation of a penalty at arbitration does not create a presumption that payment of fees is warranted.¹⁸ Rather, the critical question is whether the agency acted unreasonably by imposing a penalty that it knew or should have known would not be sustained.¹⁹ In addition, the Authority has held that, in making this determination, "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."²⁰

Here, the Arbitrator properly conducted this evaluation. In concluding that the Agency acted unreasonably in imposing the grievant's discipline, the Arbitrator considered "written descriptions of what had occurred during the incident" and found that the grievant did not use threats or any profanity during the altercation.²¹ He also found that the Agency had no applicable table of penalties; had failed to consider the appropriateness of lesser discipline based on the

⁵ The Arbitrator reduced the attorney fees "based on the simplicity of the case, the fact that the [g]rievant was found guilty of misconduct[,] and that there was some clerical work done by [the Union's attorney] that could have been done at a reduced cost." *Id.* at 26.

⁶ Exceptions, Attach. H, Email Chain (Email) at 5; *see* Resp. at 48.

⁷ Email at 5.

⁸ *Id.*

⁹ Exceptions, Attach. I, Union Subsequent Fee Statement at 9-10 (requesting attorney fees for an additional 18.2 hours of work related to the response).

¹⁰ Exceptions, Attach. J, Arbitrator Email June 25, 2020 (Supplemental Award) at 1.

¹¹ *Id.*

¹² 5 U.S.C. § 5596.

¹³ *NFFE, Loc. 1953*, 72 FLRA 306, 306 (2021) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).

¹⁴ *Id.* at 306-07 (citing *NFFE, Loc. 1437*, 53 FLRA 1703, 1710 (1998)).

¹⁵ *AFGE, Loc. 2002*, 70 FLRA 812, 814 (2018) (*Local 2002*) (then-Member DuBester dissenting).

¹⁶ Exceptions at 7-8.

¹⁷ *AFGE, Loc. 2076*, 71 FLRA 221, 222 (2019) (*Local 2076*) (then-Member DuBester concurring in part and dissenting in part) (citing *AFGE, Loc. 3294*, 66 FLRA 430, 432 (2012) (*Local 3294*) (Member Beck dissenting)).

¹⁸ *Id.* (citing *Dunn v. Dep't of VA*, 98 F.3d 1308, 1313 (Fed. Cir. 1996)).

¹⁹ *Id.*

²⁰ *Id.* at 223.

²¹ Initial Award at 23.

grievant's lack of prior discipline; and that the grievant's misconduct "had not become known outside the Agency or had any effect on employees within the Agency."²² Because the Arbitrator analyzed the reasonableness of the Agency's choice of penalty in a manner consistent with *Allen*,²³ we reject the Agency's argument on this point.²⁴

The Agency further argues that the Arbitrator erred in finding that only the fifth *Allen* factor was relevant in determining whether the fee award was warranted in the interest of justice.²⁵ However, the Authority has consistently held that, under *Allen*, the "interest of justice requirement is satisfied if any of the five categories applies."²⁶ Therefore, the Agency's argument does not demonstrate that the award is contrary to law.

The Agency also argues that the Arbitrator erred by not reducing the attorney fees more than twenty-five percent because the charges were sustained, and therefore, the Union did not fully succeed in having the discipline revoked.²⁷ The Authority has held that arbitrators must support their award with "a concise but clear explanation of [their] reasons for any reduction of the hours awarded."²⁸ The Authority has also found that a fact-finder must determine "whether the hours claimed are justified and . . . make a judgment – considering the nature of the case and the details of the request, . . . and defend his or her judgment in a reasoned (though brief) opinion – on what the case should have cost the party."²⁹

Here, the Arbitrator determined that the Union was "successful in its desired outcome of proving there was no just cause for the ten-day suspension, [and] that various unsuccessful claims it raised were intertwined and constituted parts of a single action."³⁰ And he clearly explained his reasons for reducing the fee award by

twenty-five percent.³¹ Therefore, we find that the Arbitrator did not err, and we deny this exception.

B. The supplemental award is contrary to law, in part.

The Agency argues that the supplemental award is contrary to law because the Arbitrator was without authority to issue it after the record was closed and the initial award was final.³² Specifically, the Agency maintains that the Union's request for additional attorney fees constituted a new issue that the Arbitrator was not authorized to consider without the joint request of the parties.³³

The Authority has held that where, as here, the Act confers statutory jurisdiction on an arbitrator to consider an attorney fee request, "the *functus officio* doctrine does not preclude the arbitrator from considering [a fee] request."³⁴ In the merits award, the Arbitrator retained jurisdiction indefinitely to resolve attorney fees.³⁵ The Union's response alerted the Arbitrator that the Union would be amending the fee petition to include time spent on the response, and the Arbitrator found that the subsequent amendment was timely.³⁶ We therefore find that the Arbitrator had

²² *Id.*

²³ See, e.g., *U.S. DHS, U.S. CBP, Wash., D.C.*, 64 FLRA 285, 287 (2009) (upholding arbitrator's determination that agency knew or should have known its penalty would not be sustained where arbitrator found that agency failed to consider the circumstances that gave rise to the incident, the grievant's lengthy discipline-free work history, or that a lesser penalty would serve sufficiently as a deterrent).

²⁴ Member Kiko notes that if the Agency had acted consistent with a table of penalties in this case, the Authority's decision in *Local 2076* would "strongly support" a finding that the Agency's penalty determination was reasonable and that the fifth *Allen* factor would not entitle the Union to attorney fees. *Local 2076*, 71 FLRA at 223.

²⁵ Exceptions at 5.

²⁶ *Local 3294*, 66 FLRA at 431 (emphasis added).

²⁷ Exceptions at 12, 15.

²⁸ *Local 2002*, 70 FLRA at 814 (citing *U.S. Dep't of VA, Med. Ctr. Detroit, Mich.*, 64 FLRA 794, 796 (2010) (VA)).

²⁹ *Id.* (quoting VA, 64 FLRA at 797).

³⁰ Initial Award at 25.

³¹ *Id.* at 24-26 (finding that the attorney spent a reasonable number of hours on legitimate activities in representing the Union, but the Union was not entitled to attorney fees for time spent on unsuccessful legal or clerical matters such as time spent preparing a witness whose testimony "did not significantly affect" his decision on the merits). See *Local 2002*, 70 FLRA at 814.

³² Exceptions at 12-14. Because the parties do not contest whether the Arbitrator's response email is a supplemental award, we need not resolve that issue. E.g., *NFFE, Loc. 11*, 53 FLRA 1747 (1998) (finding that an arbitrator's letter after an award had become final constituted a supplemental award).

³³ Exceptions at 13.

³⁴ *Ala. Ass'n of Civilian Technicians*, 52 FLRA 1386, 1388 (1997); see *Ala. Ass'n of Civilian Technicians*, 56 FLRA 231, 235 (2000). Consistent with this principle, fee requests can be submitted anytime within a reasonable time after the merits award. See *AFGE, Loc. 1156*, 56 FLRA 1024, 1026 (2000). The cases relied upon by the Agency do not concern fee awards. Exceptions at 13 (citing *AFGE, Loc. 2923*, 61 FLRA 725 (2006) (discussing a merits award regarding reporting of official time); *SSA*, 59 FLRA 257 (2003) (Member Pope dissenting in part) (discussing a merits award regarding discipline)).

³⁵ Exceptions, Attach. C, Arbitrator Award on Merits at 22.

³⁶ Supplemental Award at 1.

authority to consider the Union's request for additional fees and issue the supplemental award.³⁷

The Agency also contends that the supplemental award is contrary to law because the Arbitrator failed to make specific findings to support his award of seventy-five percent of the requested additional attorney fees for preparing the response.³⁸ Under 5 U.S.C. § 7701(g), an arbitrator must provide a fully articulated, reasoned decision setting forth the specific findings supporting a determination on each pertinent statutory requirement.³⁹ And, when an arbitrator finds an entitlement to fees, but fails to provide a reasoned decision as to the reasonable amount of attorney fees, the Authority will either modify the award or remand it to the parties for resubmission to the arbitrator.⁴⁰

As noted, in his June 22, 2020 response, the Arbitrator indicated that he did not include the time spent on the response in the initial fee award because he "did not know the amount of time involved" in preparing the response.⁴¹ Nevertheless, he awarded the Union seventy-five percent of its additional fee request, but only based on an assumption that this amount was reasonable and the Agency did not object.⁴² The Arbitrator's

June 25, 2020 email rejecting the Agency's objections provided no additional analysis to support the award of additional fees.⁴³

Because the Arbitrator's supplemental award fails to provide any analysis addressing the reasonableness of the Union's request, we find that it does not satisfy the standards established under § 7701(g).⁴⁴ Accordingly, we set aside the supplemental award and remand the award to the parties for resubmission to the Arbitrator, absent settlement, to make specific findings regarding the reasonableness of the requested additional fees.

IV. Decision

We deny the Agency's exceptions, in part, grant them in part, and set aside the supplemental award. We remand the matter of the additional fee request to the parties for resubmission to the Arbitrator absent settlement.

³⁷ The Agency also asserts that consideration of the Union's request for additional fees "denied the Agency a fair hearing on this new issue." Exceptions at 14. However, other than this bare assertion, the Agency does not explain how the Arbitrator refused to hear or consider pertinent and material evidence, or that he conducted the proceedings in a manner that so prejudiced a party as to affect the fairness of the proceedings as a whole. See *AFGE, Loc. 3369*, 72 FLRA 158, 160 (2021). Therefore, to the extent that the Agency raises a fair-hearing exception, we deny it as unsupported. 5 C.F.R. § 2425.6(e)(1) (exceptions are subject to denial if they fail to support arguments that raise recognized grounds for review); e.g., *AFGE, Loc. 2338*, 71 FLRA 1039, 1040 n.17 (2020) (citing *U.S. Dep't of VA, Gulf Coast Veterans Health Care Sys.*, 69 FLRA 608, 610 (2016)).

³⁸ Exceptions at 13-14.

³⁹ *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Pollack, La.*, 70 FLRA 195, 196 (2017) (*BOP*); see *AFGE, Loc. 1633*, 71 FLRA 211, 213-14 (2019); see 5 C.F.R. § 550.807(c)(2) (attorney fees may be awarded only where "[t]here is a specific finding by the appropriate authority setting forth the reasons such payment is in the interest of justice").

⁴⁰ *BOP*, 70 FLRA at 196. But see *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr., Newport, R.I.*, 57 FLRA 32, 35 (2001) (noting that "when an arbitrator has resolved a grievance over an unjustified or unwarranted personnel action, the arbitrator, not the Authority, is the 'appropriate authority' for resolving the request for an award of attorney fees").

⁴¹ Email at 5.

⁴² *Id.*; see *FAA, Wash. Flight Serv. Activity*, 27 FLRA 901, 904 (1987) (stating that a prevailing party is entitled to recover reasonable attorney fees incurred for work done in relation to a fee dispute); see also 5 C.F.R. § 550.807(b) (if employee or employee's representative submits attorney-fee request, "[t]he appropriate authority to which such a request is presented shall

provide an opportunity for the employing agency to respond to a request for payment of reasonable attorney fees").

⁴³ Supplemental Award at 1.

⁴⁴ See *BOP*, 70 FLRA at 196-97.

Member Abbott, concurring:

Because the Agency does not challenge the Arbitrator's mitigation of the penalty from a ten-day suspension to a written reprimand, its challenge to the attorney fees awards seems a bit out of place. Therefore, I agree with my colleagues that the Agency's exceptions should be denied.

My concern with this case, however, is not new. I have previously expressed my concerns with arbitrable review of the penalty determinations made by Agency deciding officials in disciplinary cases. Far too often arbitrators simply substitute their own sense of what an appropriate penalty should be¹ even when the deciding official properly considered all of the relevant *Douglas v. Veterans Administration* (*Douglas*) factors,² which after 40 years still stand as the boilerplate and guide for determining an appropriate penalty in disciplinary cases.

When the Merit Systems Protection Board (MSPB or the Board) reviews an imposed penalty, that review is quite constrained. Former Board Member Mark Robbins observed that the Board gives greater deference to the agency's penalty determination and that agency heads have primary discretion in employee discipline – *not the Board*. The Board has consistently held that:

the employing agency, and not the Board, has primary discretion in maintaining employee discipline and efficiency. The Board will not displace management's responsibility, but instead will ensure that managerial judgment has been properly exercised. Mitigation of an agency-imposed penalty is appropriate only where the agency failed to weigh the relevant factors or where the agency's judgment clearly exceeded the limits of reasonableness. The deciding official need not show that he considered all the mitigating factors, and the Board will independently weigh the relevant factors only if the deciding official failed to demonstrate that he considered any specific, relevant mitigating factors before deciding on a penalty.³

While the national grievance procedure (NGP) is the sole avenue of redress for bargaining unit employees (BUE) who have received penalties of less than fourteen days, they have the option of taking more severe disciplinary cases through the NGP rather than exercising an appeal to the MSPB. Nonetheless, arbitrators far too frequently seem to feel unconstrained by the same degree of deference that is applied by the MSPB. Contrary to some earlier decisions of the Authority, it seems obvious to me that arbitrators should not be free to fashion their own sense of justice when they determine that discipline is warranted, especially where there is no dispute as to the validity of the discipline. They should be constrained to the same extent that the Board constrains itself in both the application of the *Douglas* factors and the level of deference accorded to Agency deciding officials. Our decisions that have held otherwise should no longer be followed. There should not be two standards of review in disciplinary cases – one that applies only to BUEs and one that applies to all other federal employees. That is fundamentally inconsistent with basic notions of equal protection under the law.

I see no basis upon which the Agency's penalty determination warranted mitigation had the Arbitrator applied the *Douglas* factors and accorded deference to the Agency's penalty choice as would have the MSPB. Although this question is not before us, it presents the opportunity to observe and denounce another example of an arbitrator applying their own sense of industrial justice rather than the standards that have ensured for over forty years that discipline and penalties are applied as consistently as possible without any regard to whether the discipline is imposed on a BUE or a non-BUE.

¹ SSA, 71 FLRA 798, 803 (2020) (Dissenting Opinion of Member Abbott); *U.S. DOD, Def. Logistics Agency, Distrib. Warner Robins, Warner Robins Air Force Base, Ga.*, 71 FLRA 1029, 1032 (2020) (Dissenting Opinion of Member Abbott).

² 5 M.S.P.R. 280, 305-06 (1981).

³ See *Saiz v. Dep't of Navy*, 122 M.S.P.R. 521, 524 (2015) (internal citations omitted); *Batara v. Dep't of Navy* 123 M.S.P.R. 278, 281 (2016).
