73 FLRA No. 106

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 4012
(Union)

and

SOCIAL SECURITY ADMINISTRATION
DENVER, COLORADO
(Agency)

0-AR-5848

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DECISION

May 26, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member
(Chairman Grundmann concurring**)**

I. Statement of the Case

After the Agency suspended an employee (the grievant) for fourteen days, the Union grieved the suspension. Arbitrator Michelle Miller-Kotula issued an award (the merits award) sustaining the charges against the grievant but reducing the suspension to seven days. The Union then filed a motion for attorney fees, which the Arbitrator denied in a separate award (the fee award) on the basis that fees were not warranted in the interest of justice.

The Union filed exceptions to the fee award, arguing that: (1) that award is contrary to the Back Pay Act,[1] Authority precedent, and public policy; and (2) the Authority's existing interest-of-justice precedent conflicts with public policy. Because the Arbitrator's denial of attorney fees is consistent with the Back Pay Act and Authority precedent, we deny the contrary-to-law exceptions. Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations,[2] we dismiss the exception arguing that public policy required the Arbitrator to award attorney fees, because the Union could have presented this argument to the Arbitrator but did not. Finally, we deny the remaining public-policy exception because the Union fails to identify how the Authority's precedent governing its review of attorney-fee awards violates public policy.

II. Background and Arbitrator's Award

The Agency investigated the grievant following reports that she displayed profane material in her cubicle. Following the investigation, the Agency suspended the grievant for fourteen days for conduct unbecoming of a federal employee and for lack of candor during the investigation. The Union grieved the suspension, claiming the Agency did not have cause to discipline the grievant. The Union also argued that the Agency misapplied the factors set forth by the Merit Systems Protection Board (MSPB) in *Douglas v. Veterans Administration*[3] (the *Douglas* factors) when selecting the appropriate penalty. The grievance proceeded to arbitration.

In the merits award, the Arbitrator found that the Agency had just cause to discipline the grievant. However, the Arbitrator determined that the grievant understood the seriousness of her actions and "ha[d] the potential to learn from what occurred."[4] Based on this determination, the Arbitrator reapplied the *Douglas* factors and reduced the grievant's suspension from fourteen days to seven.

Later, the Union filed a motion for attorney fees with the Arbitrator, claiming that attorney fees were warranted in the interest of justice under the five factors the MSPB articulated in *Allen v. U.S. Postal Service* (*Allen*).[5] Specifically, the Union argued that the fifth *Allen* factor—whether the agency knew or should have known that it would not prevail on the merits of the disciplinary action[6]—supported awarding attorney fees because the Agency should have known that the Arbitrator would mitigate the grievant's suspension. The Union also noted that the *Allen* factors are not an exhaustive list, and, thus, the Arbitrator could address other considerations.

In the fee award, the Arbitrator found the fifth *Allen* factor did not support awarding fees for two reasons. First, the Arbitrator determined that "the Agency prevailed on the merits" when the Arbitrator upheld the suspension in the merits award.[7] Second, the Arbitrator stated that she mitigated the discipline based on the grievant's post-discipline conduct, which was

[1] 5 U.S.C. § 5596.
[2] 5 C.F.R. §§ 2425.4(c), 2429.5.
[3] 5 M.S.P.R. 280, 305-06 (1981).
[4] Merits Award at 77; *id.* ("The grievant is now aware of what she did wrong. It is also my opinion [that] the grievant realizes the importance of being candid in Weingarten interviews based on what occurred with this grievance.").
[5] 2 M.S.P.R. 420, 434-35 (1980).
[6] *Id.* at 435.
[7] Fee Award at 13.

"information that the Agency would not have known [and] should [not] have known" before it imposed discipline.[8]

The Arbitrator acknowledged that the Authority has held attorney fees may be warranted in the interest of justice even when none of the *Allen* factors are satisfied.[9] However, she found nothing "else in the record to support [a conclusion that] an award of [attorney] fees [was] warranted in the interest of justice."[10] Consequently, the Arbitrator denied the Union's attorney-fee request.

The Union filed exceptions to the fee award on November 28, 2022, and the Agency filed an opposition on December 28, 2022.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar one of the Union's exceptions.

The Union argues that the fee award violates public policy because the Arbitrator denied attorney fees, despite her finding that the Agency imposed excessive discipline.[11] According to the Union, this violates the "purpose of the [B]ack [P]ay [A]ct."[12]

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[13] Nothing in the record indicates that the Union argued at arbitration that any public policy required the Arbitrator to award attorney fees. Because the Union could have raised this argument to the Arbitrator but did not, we dismiss this exception under §§ 2425.4(c) and 2429.5.[14]

The Union also argues that the Authority's reliance on the *Allen* factors to determine whether attorney fees are warranted in the interest of justice is contrary to public policy.[15] The Union did not raise this argument before the Arbitrator.[16] However, the Authority has held that requests to reconsider Authority precedent are not within an arbitrator's authority and, thus, has considered such requests despite an excepting party's failure to raise them at arbitration.[17] Therefore, we consider this argument below.

IV. Analysis and Conclusions

A. The fee award is not contrary to the Back Pay Act or Authority precedent.

The Union argues that the fee award is contrary to the Back Pay Act and Authority precedent because the Arbitrator treated the *Allen* factors as a strict litmus test of whether attorney fees were warranted.[18] In resolving an exception claiming that an award is contrary to law, the Authority reviews any question of law raised by an exception and the award de novo.[19] In applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[20] In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts.[21]

Under the Back Pay Act, an attorney-fee award must be in accordance with the standards established under 5 U.S.C. § 7701(g),[22] which requires, as relevant here, that fees be warranted in the interest of justice.[23] The Authority has recognized the five *Allen* factors as a non-exhaustive list that illustrate when attorney fees are warranted in the interest of justice.[24] The Union contends that the Arbitrator's "mechanical reliance" on the *Allen* factors conflicts with this precedent,[25] and that the Arbitrator was obliged to explain her assertion that nothing "else in the record" supported awarding attorney fees.[26]

In its motion for attorney fees, the Union argued only that the fifth *Allen* factor supported its request for fees,[27] and the Arbitrator considered and rejected that argument.[28] The Arbitrator proceeded to acknowledge that she could rely on additional considerations to award fees

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[8] *Id.* at 15.
[9] *Id.* (noting that the *Allen* factors are illustrative, not exhaustive (citing *NAIL, Loc. 5*, 69 FLRA 573, 577 (2016) (*NAIL*))).
[10] *Id.*
[11] Exceptions at 5.
[12] *Id.*
[13] 5 C.F.R. §§ 2425.4(c), 2429.5.
[14] *See AFGE, Loc. 1938*, 66 FLRA 741, 742-43 (2012) (dismissing public-policy exception that could have been, but was not, raised before the arbitrator); *U.S. DHS, CBP*, 66 FLRA 495, 497 (2012) (same).
[15] Exceptions at 5.
[16] Opp'n at 3 (arguing that "the Union's failure to raise this argument below prevents the Authority from considering it here").
[17] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Mia., Fla.*, 71 FLRA 1247, 1249 n.30 (2020) (Member DuBester dissenting on other grounds) (citing *U.S. Dep't of Energy v. FLRA*, 880 F.2d 1163, 1166 (10th Cir. 1989)).
[18] Exceptions at 4 (citing *NAIL*, 69 FLRA at 577).
[19] *U.S. Dep't of the Interior, Nat'l Park Serv.*, 73 FLRA 418, 419 (2023) (citing *AFGE, Loc. 3254*, 73 FLRA 325, 326 (2022)).
[20] *Id.*
[21] *Id.*
[22] 5 U.S.C. § 5596(b)(1)(A)(ii) (incorporating the "standards established under [§] 7701(g) of this title").
[23] *AFGE, Loc. 1923*, 66 FLRA 22, 23 (2011) (Member Beck dissenting) (citing 5 U.S.C. § 7701(g)).
[24] *NAIL*, 69 FLRA at 577.
[25] Exceptions at 4.
[26] *Id.* (internal quotation marks omitted).
[27] Mot. for Att'y Fees at 7-8.
[28] Fee Award at 13-15.

but found, based on the parties' "evidence and arguments," that nothing "else in the record" supported such an award.[29] Although the Union noted in its motion the general principle that arbitrators may look beyond the *Allen* factors,[30] it did not raise to the Arbitrator, and does not raise now, any additional interest-of-justice considerations.[31] As the Union does not argue that the *Allen* factors, or any other considerations, support granting attorney fees, the Union does not establish that the award conflicts with the Back Pay Act.[32]

Consequently, we deny this exception.[33]

B. The Union does not establish that the Authority's use of the *Allen* factors is contrary to public policy.

The Union argues that the Authority's reliance on the *Allen* factors is contrary to public policy because the factors set high and "unrealistic" burdens to establish that attorney fees are warranted in the interest of justice.[34] The Authority construes public-policy exceptions extremely narrowly.[35] For an award to be found deficient on public-policy grounds, the asserted public policy must be explicit, well-defined, and dominant, and a violation of the policy must be clearly shown.[36] In addition, the appealing party must identify the policy by reference to the laws and legal precedents and not from general considerations of the supposed public interests.[37]

The Union's argument that the Authority should "reconsider" its reliance on the *Allen* factors and "provide new guidance"[38] does not challenge the award's validity. While the Union advocates for a standard that would require employees to be "reimbursed for their expenses when[ever] they prevail" in appealing a personnel action,[39] the Union does not identify any explicit, well-defined, and dominant public policy that supports such a standard.[40] In fact, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has held that prevailing at arbitration is "only a threshold test of *eligibility*" and that the interest-of-justice requirement operates to limit when attorney fees are appropriate.[41] Additionally, to the extent the Union argues that attorney fees are warranted here because the Arbitrator mitigated the grievant's discipline,[42] the Federal Circuit has noted that even "[a] presumption of fees upon mitigation of a penalty runs counter to the statutory requirement that the employee show that the interests of justice warrant an award."[43]

[29] *Id.* at 15; *see also AFGE, Loc. 1482*, 70 FLRA 214, 215 (2017) (denying exception to arbitrator's denial of attorney fees where the award, "read together" with the record, sufficiently explained each pertinent statutory requirement for attorney fees); *AFGE, Loc. 342*, 69 FLRA 278, 279 (2016) (Member DuBester concurring) (upholding denial of attorney fees where the record supported the arbitrator's finding on each pertinent statutory requirement).

[30] Mot. for Att'y Fees at 7.

[31] *See id.* at 8 (arguing only that the fifth *Allen* factor supported awarding attorney fees).

[32] *See, e.g., U.S. DHS, U.S. CBP*, 70 FLRA 73, 74-76 (2016) (finding that the union failed to establish that the arbitrator improperly applied any of the *Allen* factors); *NAIL*, 69 FLRA at 576-77 (finding that none of the *Allen* factors relied on by the union supported awarding fees).

[33] *See AFGE, Loc. 446*, 71 FLRA 1020, 1021 (2020) (Member DuBester concurring) (denying exception to fee award where union failed to demonstrate how the "[a]rbitrator's fully articulated and well-reasoned denial of attorney fees" was contrary to law); *NATCA*, 64 FLRA 799, 801 (2010) (upholding arbitrator's denial of attorney fees where the union failed to demonstrate that attorney fees were warranted in the interest of justice).

[34] Exceptions at 5.

[35] *AFGE, Loc. 1441*, 73 FLRA 36, 38 (2022).

[36] *AFGE, Loc. 2338*, 72 FLRA 216, 217 n.17 (2021) (Chairman DuBester concurring) (citing *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 71 FLRA 338, 341-42 (2019) (*Pope AFB*) (Member DuBester concurring); *NTEU, Chapter 299*, 68 FLRA 835, 840 (2015)).

[37] *Id.* (citing *Pope AFB*, 71 FLRA at 342); *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 622 (2014) (citing *NLRB, Region 9, Cincinnati, Ohio*, 66 FLRA 456, 459 (2012)).

[38] Exceptions at 5.

[39] *Id.*

[40] *Id.*

[41] *Sterner v. Dep't of the Army*, 711 F.2d 1563, 1567 (Fed. Cir. 1983) ("[T]he more difficult question of *entitlement* is reserved for the second prerequisite, 'warranted in the interest of justice.' Eligibility is broad[,] but the entitlement standard operates to limit it." (internal citations omitted)).

[42] Exceptions at 5 (arguing that the fee award is contrary to public policy because "the [grievant] received an enforceable judgment against the agency . . . [but] gets zero recovery in fees").

[43] *Dunn v. Dep't of VA*, 98 F.3d 1308, 1313 (Fed. Cir. 1996) (citing S. Rep. No. 95-969, at 61 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2783).

Based on the above, we find this exception does not provide a basis for setting aside the award or for altering Authority interest-of-justice precedent.[44]

V. Decision

We partially dismiss and partially deny the Union's exceptions.

[44] *See U.S. DHS, U.S. CBP, U.S. Border Patrol, El Paso Sector, El Paso, Tex.*, 72 FLRA 253, 258 (2021) (Member Abbott dissenting in part on other grounds) (denying a public-policy exception where the excepting party "fail[ed] to identify any public policy – let alone a public policy that is explicit and well-defined"); *Def. Sec. Assistance Dev. Ctr.*, 60 FLRA 292, 294 (2004) (denying public-policy exception that was "based on 'general considerations of supposed public interest[,]' which fail to establish the necessary explicit, well-defined, and dominant public policy" (quoting *AFGE, Loc. 2172*, 57 FLRA 625, 629 (2001))).

Chairman Grundmann, concurring:

The Arbitrator assessed whether attorney fees were warranted in the interest of justice under the fifth factor originally set forth by the Merit Systems Protection Board (MSPB) in *Allen v. U.S. Postal Service* (*Allen*).[1] That factor is whether the Agency knew or should have known it would not prevail on the merits when it brought the proceeding.[2]

In assessing that issue, the Arbitrator applied the standards that a majority of the Authority established in *AFGE, Local 2076* (*Local 2076*).[3] In *Local 2076*, the Authority majority held that, in cases involving "minor" disciplinary actions, the Authority would no longer follow MSPB precedent applying the fifth *Allen* factor.[4]

I was not a Member when the Authority issued *Local 2076* and, thus, did not participate in that case. I am open to revisiting *Local 2076* in a future, appropriate case.

However, the Union's arguments on exception are very limited here. The Union does not argue that the Arbitrator should have applied the MSPB's *Allen* standards; in fact, it effectively argues the opposite by challenging the Arbitrator's "strict reliance" on *Allen*.[5] Although I am open to considering legally sound alternatives to *Allen* and *Local 2076* in this context, the Union does not propose one here. As such, I agree that the exceptions are properly dismissed and denied for the reasons discussed in the decision.

Therefore, I concur.

[1] 2 M.S.P.R. 420 (1980).
[2] *Id.* at 435.
[3] 71 FLRA 221 (2019) (Member DuBester concurring in part and dissenting in part). *See* Fee Award at 13-15.
[4] 71 FLRA at 223.
[5] Exceptions at 4; *id.* at 5.