

63 FLRA No. 105

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES
LOCAL 1061
(Union)

and

UNITED STATES DEPARTMENT
OF VETERANS AFFAIRS
MEDICAL CENTER
LOS ANGELES, CALIFORNIA
(Agency)

0-AR-4313

DECISION

May 15, 2009

Before the Authority: Carol Waller Pope, Chairman and
Thomas M. Beck, Member

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Barbara Bridgewater filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the exceptions.¹

In her merits award, the Arbitrator rescinded the Agency's three-day suspension of the grievant and ruled that a written reprimand for inappropriate conduct be issued in its place. Subsequently, the Union filed an application for an award of attorney fees, which the Arbitrator denied in her fee award.

II. Background and Arbitrator's Award

The grievant was charged with acting inappropriately and in violation of Agency standards of conduct when he intimidated a colleague by speaking in a loud tone and pointing a pen at her in a threatening manner. He was also charged with tape recording his colleague

without her permission. Merits Award at 6. The Agency suspended the grievant for three days for behaving in a threatening manner and tape recording the conversation. *Id.* The grievant filed a grievance that was submitted to arbitration on the stipulated issues of whether the grievant acted inappropriately and, if so, whether the penalty was reasonable and just in accordance with Agency regulations and the collective bargaining agreement. *Id.* at 2.

The Arbitrator found that the grievant engaged in intimidating behavior that caused his colleague to feel threatened. Merits Award at 16. However, she found that the tape recording charge was not sustained because the Agency had not met its burden of proving by a preponderance of the evidence that the grievant made an electronic recording without permission. *Id.* at 14. In this regard, the Arbitrator observed that the grievant's supervisor could conclude that the grievant admitted he had a tape recorder with him during the incident giving rise to the charges. *Id.* at 13. The Arbitrator also observed, however, that the grievant's supervisor could conclude to the contrary. The Arbitrator concluded that the three-day suspension was not a reasonable and just penalty because the tape recording charge was not sustained and that the seriousness of the intimidation charge could be impressed upon the grievant by a written reprimand. *Id.* at 18. Therefore, the Arbitrator ruled that the suspension was to be rescinded, the grievant was to be made whole, and a written reprimand for inappropriate conduct was to be issued. *Id.*

Subsequently, the Union submitted an application for an award of attorney fees in the amount of \$42,437.50 under the Back Pay Act² and 5 U.S.C. § 7701(g)(1).³ In particular, the Union claimed that the grievant was entitled to an award of fees under the Back Pay Act because the grievant was the prevailing party and an award of fees was warranted in the interest of justice. Fee Motion at 3-5. As for the interest of justice, the Union asserted that the Agency knew or should have known that it would not prevail on the merits and that the grievant was substantially innocent of the charges brought by the Agency. *Id.* at 4-5. In response, the

1. The Union filed an unsolicited response to the Agency's opposition. As the Authority's Regulations do not provide for the filing of supplemental submissions, and as the Union failed to request permission to file its submission under § 2429.26, we have not considered the submission. *See, e.g., AFGGE, Local 12*, 61 FLRA 355, 355 n.1 (2005) (citing *United States Dep't of HHS, FDA*, 60 FLRA 250, 250 n.1 (2004)).

2. The Back Pay Act, at 5 U.S.C. § 5596, provides that "reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed . . . shall be awarded in accordance with standards established under [5 U.S.C. § 7701(g)] . . ." 5 U.S.C. § 5596(b)(1)(A)(ii).

3. Section 7701(g)(1) provides, in part, for an award of "reasonable attorney fees incurred by an employee" provided "the employee . . . is the prevailing party" and payment "is warranted in the interest of justice[.]"

Agency disputed that an award of fees was warranted in the interest of justice and that the Union's requested amount was reasonable. Opposition to Fee Motion at 2-5.

In resolving the Union's application, the Arbitrator concluded that the Agency did not know or have reason to know that the charges would not be upheld. Fee Award at 4. The Arbitrator also concluded that the grievant was not substantially innocent because he did not prevail on the more serious of the two charges. *Id.* Therefore, the Arbitrator denied the fee request. *Id.*

III. Positions of the Parties

A. Union's Exceptions

The Union contends that the award is contrary to law to the extent that the Arbitrator concluded that payment of fees was not warranted in the interest of justice. Exceptions at 2. Specifically, the Union contends that payment of fees was warranted in the interest of justice because the Agency should have known at the time it imposed discipline on the grievant that it would not prevail on the tape recording charge. *Id.* at 18-20. In addition, the Union contends that the grievant was substantially innocent because he prevailed in one of two equally serious charges. *Id.* at 23-24. The Union contends that payment of fees is also warranted in the interest of justice because the Agency engaged in a prohibited personnel practice. *Id.* at 26-27. The Union identifies the personnel practice as a "decision concerning pay" covered by 5 U.S.C. § 2302(a)(2)(A)(ix). *Id.* at 26. In addition to asserting that the award is deficient because the award of fees is warranted in the interest of justice, the Union also excepts on the grounds that: (1) the award was based on the Arbitrator's bias against the Union, Exceptions at 4-11; and (2) the Arbitrator issued a conclusory ruling. *Id.* at 11. In support of its claim of bias, the Union cites to the Arbitrator's delay in issuing the award, summarizes repeated unsolicited voice mails from the Arbitrator containing "misrepresentations" that a ruling would be issued promptly, and notes that the Agency did not receive similar voice mails. *Id.* at 4-9. The Union also claims that the Arbitrator issued a "bias[ed] and vindictive" ruling after the Union reported the Arbitrator's delay in issuing a ruling to the Federal Mediation and Conciliation Service. *Id.* at 8 and 11. In support of its claim that the ruling was conclusory, the Union notes that it is four pages long and that the Arbitrator misstates the facts of a decision upon which she relies, *Shelton v. OPM*, 42 M.S.P.R. 214 (1989), *aff'd*, 904 F.2d 46 (Fed. Cir. 1990). *Id.* at 10-11.⁴

B. Agency's Opposition

The Agency contends that the grievant was not substantially innocent because the Agency did not engage in an unwarranted or unjustified personnel action. Opposition at 7. Stated otherwise, based on the record before the Arbitrator, the grievant was not without fault for the charges alleged. *Id.* In support of its contention, the Agency points out that the intimidation charge was sustained and that as for the tape recording charge, although it was not sustained, the Arbitrator found that Agency management could have concluded that the grievant admitted to carrying a tape recorder during the incident. *Id.* at 7-8.

As for the Union's claim of bias by the Arbitrator, the Agency contends that the Arbitrator's voice mails to the Union apologizing for the delay in her ruling did not demonstrate bias or destroy the fundamental fairness of her decision. Opposition at 5. In addition, the Agency contended that the award was well reasoned and supported by the record. *Id.* Specifically, the Agency contends that the *Shelton* decision supports an arbitrator's denial of attorney fees when the more significant of two charges is sustained and, therefore, the employee is not substantially innocent. *Id.* As for the Union's contention that the Arbitrator's ruling was conclusory because it was brief, the Agency finds its length to be appropriate because the arbitration lasted for less than one day, there were only two charges involved, the applicable law is well established, and the Arbitrator previously had issued an 18-page decision on the underlying merits. *Id.* at 2.

IV. Analysis and Conclusions

When an exception involves an award's consistency with the law, the Authority receives any question of law raised by the exception and the award *de novo*. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995). In applying the standard of *de novo* review, the Authority assesses whether the arbitrator's legal conclusion is consistent with the applicable standard of law. *United States Gen. Servs. Admin., Ne. & Caribbean Region, N.Y., N.Y.*, 61 FLRA 68, 69 (2005) (*GSA*). In making that assessment, we defer to the arbitrator's underlying

4. The award describes *Shelton* as involving the reduction of a 14-day suspension to a 1-day suspension after a dismissal of some of the charges. Fee Award at 4. In fact, *Shelton* involved the reduction of a termination for unsuitability to a 120-day suspension. However, the fee award correctly notes that the Merit Systems Protection Board held that when an agency's penalty is based on multiple charges, some of which are not sustained, it cannot be said that the agency should have known that its original penalty selection was not reasonable. Fee Award at 4; *see Shelton*, 42 M.S.P.R. at 221-22.

factual findings. *See, e.g., NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).

Under the Back Pay Act, 5 U.S.C. § 5596, an award of attorney fees must be in accordance with the standards established under 5 U.S.C. § 7701(g). The prerequisites for an award of attorney fees under § 7701(g) are that: (1) the employee is the prevailing party; (2) the award of fees is warranted in the interest of justice; (3) the amount of fees is reasonable; and (4) the fees were incurred by the employee. *United States Dep't of the Treasury, IRS, Phila. Serv. Ctr., Phila., Pa.*, 53 FLRA 1697, 1699 (1998).

A. Attorney fees are not warranted in the interest of justice.

When exceptions concern standards established under § 7701(g), the Authority looks to the decisions of the Merit Systems Protection Board (MSPB) and the United States Court of Appeals for the Federal Circuit for guidance. *See United States Dep't of Def., Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 160 n.5 (1995). In *Allen v. United States Postal Service*, 2 M.S.P.R. 420 (1980) (*Allen*), the MSPB listed five broad categories of cases in which an award of attorney fees would be warranted in the interest of justice: (1) cases involving a prohibited personnel practice; (2) agency actions clearly without merit or wholly unfounded, or in which the employee is substantially innocent of charges brought by the agency; (3) agency actions taken in bad faith to harass or exert improper pressure on an employee; (4) agency gross procedural error which prolonged the proceeding or severely prejudiced the employee; or (5) cases where the agency knew or should have known it would not prevail on the merits when it brought the proceeding. 2 M.S.P.R. at 434-35. Another criterion that the Authority has added is whether a service was rendered to the federal work force, or the public derived a benefit, from maintaining the action. *Naval Air Dev. Ctr., Dep't of the Navy*, 21 FLRA 131, 139 (1986). The Authority applies these criteria in resolving exceptions to an arbitrator's determination under the "interest of justice" standard. *United States Dep't of Veterans Affairs Med. Ctr., Asheville, N.C.*, 59 FLRA 605, 609 (2004). An award of fees is warranted if any of these criteria is satisfied. *Id.* at 609.

In its exceptions, the Union contends that an award of fees is warranted in the interest of justice because of the first, second, and fifth *Allen* criteria.

1. No prohibited personnel practice was involved.

The first criterion for an award of attorney fees warranted in the interest of justice is whether the agency

engaged in a prohibited personnel practice. *Allen*, 2 M.S.P.R. at 434. The Union asserts that the Agency committed a prohibited personnel practice when it imposed the three-day suspension. The Union identifies the personnel practice as a "decision concerning pay" covered by 5 U.S.C. § 2302(a)(2)(A)(ix). Exceptions at 26. However, the Union does not identify which of the 12 types of prohibitions set out in 5 U.S.C. § 2302(b) is at issue in this case or explain how the Agency's action constituted a prohibited personnel practice. Therefore, the Union's claim amounts to a bare assertion that does not support its position. *See AFGF, Council 220*, 61 FLRA 582, 585 (2006).

Accordingly, attorney fees are not warranted under criterion 1 of the "interest of justice" standard.

2. The grievant was not substantially innocent of the charges.

The second criterion for an award of attorney fees warranted in the interest of justice is whether the agency action is clearly without merit or wholly unfounded, or whether the appellant is substantially innocent of the charges brought by the agency. *Allen*, 2 M.S.P.R. at 434. The Federal Circuit has found that "substantial[] innocence" is an operative *Allen* category in and of itself. *Van Fossen v. Merit Systems Protection Board*, 788 F.2d 748, 751 (Fed. Cir. 1986). The "substantial" aspect is met when the employee is without fault, and was needlessly subjected to attorney fees in order to vindicate himself. *Jones v. Department of Defense*, 42 M.S.P.R. 35, 42 (1989) (citing *Massa v. Department of Defense*, 833 F.2d 991 (Fed. Cir. 1987)). Put another way, it is met when the employee "is innocent of the primary or major charges, or of the more important and greater part of the original charges." 42 M.S.P.R. at 42. *See also Boese v. Dep't of the Air Force*, 784 F.2d 388 (Fed. Cir. 1986) (*Boese*) (fees awarded when employee vindicated on the major charge and the secondary charge was upheld); *Van Fossen, supra* (fees awarded when sustained charges were technical and very minor). The "substantially innocent" criterion of *Allen* refers to the "result of the case" in an arbitration award or before the MSPB. *Boese*, 784 F.2d at 391; *NAGE, Local R5-188*, 54 FLRA 1401, 1407 (1998) (Member Wasserman dissenting on other grounds).

The determinative principle of these holdings is that substantial innocence is an objective assessment of the merits of the employee's challenge to the agency's disciplinary action. These cases demonstrate that an employee who has prevailed on substantive rather than technical grounds on the major charges is substantially

innocent as a matter of law. *NAGE, Local R5-188*, 54 FLRA at 1407.

The Arbitrator's factual findings, to which we defer, establish that the grievant was not substantially innocent within the meaning of the second *Allen* criterion. Specifically, the Arbitrator found that the grievant was disrespectful and engaged in intimidating behavior that threatened his colleague. Therefore, the Arbitrator found that the grievant did not prevail on the Agency's more serious charge. Merits Award at 16; Fee Award at 2-4. Consistent with *Van Fossen* and *Boese*, this finding supports the Arbitrator's conclusion on this criterion. See, e.g., *Jones, supra*.

Accordingly, attorney fees are not warranted under criterion 2 of the "interest of justice" standard.

3. The agency did not know and should not have known that it would not Prevail on the merits.

The fifth criterion for an award of attorney fees warranted in the interest of justice is whether the agency "knew or should have known that it would not prevail on the merits" when it brought the proceeding. 2 M.S.P.R. at 435. A determination of whether an agency knew or should have known it would not prevail on the merits requires an arbitrator to determine the reasonableness of the agency's actions in light of the information available to the agency at the time it imposed discipline. *GSA*, 61 FLRA at 70. This determination is primarily factual because the arbitrator evaluates the evidence and the agency's handling of the evidence. *Id.* Consequently, when the factual findings support the arbitrator's legal conclusion, the Authority will deny the exceptions to the arbitrator's determination. *Id.*

In addition, the Authority has held that "the penalty is part of the merits of the case, and that attorney fees are warranted in the interest of justice where the agency knew or should have known that its choice of penalty would be reversed." *AFGE, Local 12*, 38 FLRA 1240, 1253 (1990) (citing *Lambert v. Dep't of the Air Force*, 34 M.S.P.R. 501, 505 (1987)). Where an agency's choice of penalty is based on multiple charges, and an arbitrator's decision to reduce the penalty is based in part on the fact that not all of the charges were sustained, "it cannot be said that the agency should have known its original penalty selection was not reasonable." *NAGE, Local R4-6*, 56 FLRA 1092, 1095 (2001) (quoting *Shelton*, 42 M.S.P.R. at 221-22).

Here, the Agency determined what penalty to impose based on its evaluation of two charges, threatening behavior and impermissible tape recording, and the Arbitrator reduced the penalty based on her dismissal of

the tape recording charge. Although the Arbitrator dismissed that charge, she found that Agency management could have concluded that the grievant admitted to carrying a tape recorder during the incident of threatening behavior. Merits Award at 13. Moreover, the Arbitrator found that the testimony and documentary evidence presented during the hearing demonstrated that the Agency had no substantive basis for believing, at the time the discipline was imposed, that the tape recording charge would not be sustained. Fee Award at 4. These findings support the Arbitrator's conclusion that the Agency neither knew nor should have known that its three-day penalty would not be sustained on appeal.

Accordingly, attorney fees are not warranted under criterion 5 of the "interest of justice" standard.

B. The Arbitrator was not biased.

To establish that an award is deficient because of bias on the part of the arbitrator, a party must show that an award was procured by improper means, that the arbitrator was partial or corrupt, or that the arbitrator engaged in misconduct that prejudiced the parties' rights. *NAGE, Local R1-109*, 58 FLRA 501, 504 (2003). The Union's allegations that the Arbitrator took too long to issue her ruling and made repeated "misrepresentations" that a ruling would be issued promptly do not establish bias on the part of the Arbitrator. See *United States Dep't of Veterans Affairs Med. Ctr., N. Chicago, Ill.*, 52 FLRA 387, 398 (1996) (Allegation that arbitrator repeated an inaccurate statement does not establish bias). Likewise, the Union's allegation that the Arbitrator issued a biased ruling after the Union reported the Arbitrator's delay in issuing her ruling to the Federal Mediation and Conciliation Service does not establish arbitrator bias. Even if the Arbitrator's award contains language critical of the Union, which the Union does not allege, arbitrator bias would not be established. See *AFGE, Local 4042*, 51 FLRA 1709, 1714 (1996) (the forcefulness of the arbitrator's findings and the language in his opinion sharply critical of the union, alone, failed to establish that the arbitrator was biased).

Accordingly, based on the foregoing, we deny this exception.

C. The Arbitrator set forth a fully articulated decision.

The Union claims that the fee award was conclusory, primarily because it was four pages long with one-and-one-half pages of analysis. Exceptions at 11. In resolving a request for attorney fees under the Back Pay Act, an arbitrator must provide a fully articulated, reasoned decision setting forth specific findings supporting

determinations on each pertinent statutory requirement. *NAGE, Local RI-109*, 49 FLRA 815, 818 (1994). It is clear from the award that the Arbitrator sufficiently articulated her reasons with respect to her determination that an award of attorney fees was not in the interest of justice. Specifically, the Arbitrator discussed each of the six standards set out in *Allen v. United States Postal Service, supra*, when determining that attorney fees were not warranted as in the interest of justice. Fee Award at 3-4. As such, the record permits us to appropriately resolve the exceptions disputing the Arbitrator's determinations on pertinent statutory requirements.⁵

Accordingly, based on the foregoing, we deny this exception.

V. Decision

The Union's exceptions are denied.

5. Even if the Arbitrator had failed to sufficiently articulate her award, such a failure would not have rendered the award deficient. As the Authority explained in *United States Dep't of Agric., Animal & Plant Health Inspection Service, Plant Prot. & Quarantine*, 53 FLRA 1688, 1695 (1998), when an arbitrator has not sufficiently explained a determination on a pertinent statutory requirement, the Authority will examine the record to determine whether it permits us to properly resolve the exception. In cases where the record permits us to properly resolve the exception, we will modify the award or deny the exception, as appropriate. In cases where the record does not permit us to determine the proper resolution of the exception, we will remand for further proceedings.