66 FLRA No. 7

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1923
(Union)

and

SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND
(Agency)

0-AR-4496

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DECISION

August 25, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

This matter is before the Authority on exceptions to an initial award and a supplemental award of Arbitrator Barry E. Shapiro 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 Union's exceptions.

In his initial award, the Arbitrator stated that awarding attorney fees to the Union would be inappropriate, and in his supplemental award, he denied the Union's request for fees. For the following reasons, we set aside the awards and remand this matter to the parties for resubmission to the Arbitrator, absent settlement.

II. Background and Arbitrator's Awards

The Union filed a grievance challenging the grievant's five-day suspension for failure to follow instructions and properly handle personally identifiable information. Initial Award at 2-3. In his initial award, the Arbitrator framed the issue as "whether the Agency's suspension of [the] [g]rievant for five days without pay was for such cause as promotes the efficiency of the service[.]" *Id.* at 1. Although the Arbitrator found that there was cause for discipline, he also found that a five-day suspension was not warranted. *Id.* at 3, 5. In making this determination, the Arbitrator found that the grievant's actions, "while unfortunate and inappropriate, were not of such severity as to warrant bypassing the earlier steps of progressive discipline." *Id.* at 5. He further noted that the grievant "had never been disciplined during [her] more than [thirty-five] years of . . . service" preceding the incident. *Id.* Accordingly, the Arbitrator sustained the grievance, reducing the suspension to a reprimand based on the grievant's "long and, apparently, effective and conscientious service." *Id.* The Arbitrator awarded backpay, but determined that, "in light of the [g]rievant's responsibility for her actions[,]" an award of attorney fees "would not be appropriate." *Id.*

The Union subsequently filed a motion requesting an award of attorney fees. Exceptions, Attach. 3 at 1-2. In the motion, the Union stated that, in the initial award, the Arbitrator had been "unable to provide the parties with a 'fully articulated, reasoned' decision" for his denial of fees, due to the absence of a formal request for fees by the Union. *Id.* at 2. In addition, the Union argued that its fee request was reasonable and warranted in the interest of justice under the fourth and fifth criteria set forth by the Merit Systems Protection Board (MSPB) in *Allen v. United States Postal Service*, 2 M.S.P.R. 420 (1980) (*Allen*).[2] *Id.* at 5-9. The Agency opposed the motion. Opp'n, Attach. 5 at 2-6.

In his supplemental award, the Arbitrator noted, as an initial matter, that "the Agency was found by me to have taken an unjustified personnel action that resulted in the withdrawal of five days' pay to [the] [g]rievant." Supplemental Award at 2. Next, applying the criteria set forth in *Allen*, the Arbitrator found that attorney fees were not warranted in the interest of justice under the fourth and fifth *Allen* criteria, respectively, because: (1) "the fact that [he] ultimately disagreed with the Agency's judgment" concerning its decision to bypass steps of progressive discipline "[did] not mean [that] the Agency committed a gross procedural error"; and (2) his

[1] Member Beck's dissenting opinion is set forth at the end of this decision.

[2] In *Allen*, the MSPB established criteria to determine whether a fee award is warranted in the "interest of justice." Under *Allen*, an award of fees is warranted in the interest of justice if: (1) the agency engaged in a prohibited personnel practice; (2) the agency's actions are clearly without merit or wholly unfounded, or the employee is substantially innocent of charges brought by the agency; (3) the agency's actions are taken in bad faith to harass or exert improper pressure on an employee; (4) the agency committed 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. *See, e.g., AFGE, Local 3020*, 64 FLRA 596, 597 n.* (2010). The Authority has stated that an award of fees is also warranted in the interest of justice when there is either a service rendered to the federal workforce or there is a benefit to the public derived from maintaining the action. *Id.*

disagreement with the Agency about the penalty "is not a basis for finding that the Agency should have known that its decision to suspend [the] [g]rievant would not be sustained by a third party." *Id.* Accordingly, the Arbitrator denied the Union's request for attorney fees. *Id.*

III. Positions of the Parties

A. Union's Exceptions

The Union contends that the Arbitrator's denial of attorney fees is contrary to the Back Pay Act (BPA). Exceptions at 5-14. The Union asserts that the Arbitrator correctly found that the grievant suffered an unjustified or unwarranted personnel action, but argues that the Arbitrator incorrectly determined that the Union's request for attorney fees did not satisfy the prerequisites of 5 U.S.C. § 7701(g). *Id.* Specifically, the Union contends that fees are warranted in the interest of justice under the fourth and fifth *Allen* criteria, respectively, because: (1) "by failing to follow the steps of progressive discipline[,]" the Agency "severely prejudiced the grievant" by "depriv[ing] [her] of an income" and the ability "to seek a promotion or employment elsewhere" during the suspension, *id.* at 8-9; and (2) the Agency knew or should have known that the grievant's suspension would not be sustained because the Arbitrator mitigated the penalty based on evidence available to the Agency at the time of the discipline -- specifically, her "[thirty-seven] years of exemplary government service," *id.* at 9-11. The Union also contends that: (1) the grievant is a prevailing party; (2) the requested fees are reasonable; and (3) the grievant incurred the fees. *Id.* at 5-7, 12-13.

B. Agency's Opposition

The Agency argues that attorney fees are not warranted in the interest of justice. Opp'n at 2-8. With respect to the fourth *Allen* criterion, the Agency contends that "the Union has not shown that a gross procedural error exists." *Id.* at 4. With regard to the fifth *Allen* criterion, the Agency argues that the Arbitrator correctly held that the Agency had no reason to know that its choice of discipline would not be sustained. *Id.* at 6. In addition, the Agency asserts that, although "the Arbitrator used the language 'unjustified personnel action,' . . . [he] also clearly stated that 'the Agency had cause to discipline [the grievant].'" *Id.* at 2 (alteration in original). The Agency also asserts that "the fact that the grievant is the prevailing party" does not necessarily entitle the Union to attorney fees because "[i]f the lawmakers wanted to automatically award attorney fees to all prevailing parties, there would not be different standards for receiving attorney fees." *Id.* at 3.

IV. Analysis and Conclusions

The Union argues that the Arbitrator's denial of attorney fees is contrary to the BPA. When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *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. *See 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. *See id.*

Under the BPA, an award of attorney fees must be in accordance with the standards established under 5 U.S.C. § 7701(g).[3] The prerequisites for an award under § 7701(g) are that: (1) the employee must be the prevailing party; (2) the award of attorney fees must be warranted in the interest of justice; (3) the amount of fees must be reasonable; and (4) the fees must have been incurred by the employee. *See U.S. DoD, Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 158 (1995).

The Arbitrator denied the Union's motion for attorney fees solely on the ground that the fees were not warranted in the interest of justice. The Authority resolves whether an award of fees is warranted in the interest of justice in accordance with § 7701(g)(1) by applying the criteria established by the MSPB in *Allen*. In resolving whether an arbitrator properly applied the criteria, the Authority looks to the decisions of the MSPB and the United States Court of Appeals for the Federal

[3] The threshold requirement for an award of attorney fees under the BPA is a finding that the grievant was affected by an unjustified or unwarranted personnel action, which resulted in a withdrawal or reduction of the grievant's pay, allowances, or differentials. *See U.S. DoD, Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 158 (1995). The BPA further requires that an award of fees must be: (1) in conjunction with an award of backpay to the grievant on correction of the personnel action; (2) reasonable and related to the personnel action; and (3) in accordance with standards established under 5 U.S.C. § 7701(g). *See id.* We note the Agency's argument that, although "the Arbitrator used the language 'unjustified personnel action,' . . . [he] also clearly stated that 'the Agency had cause to discipline [the grievant].'" Opp'n at 2 (alteration in original). To the extent that the Agency's claim constitutes an exception to the underlying award of backpay, the exception is untimely because the Agency's opposition was not filed within thirty days of service of the award. *See former* 5 C.F.R. § 2425.1(b). Accordingly, we do not consider the Agency's claim.

Circuit. *NAGE, Local R5-188*, 54 FLRA 1401, 1406 (1998). An award of fees is warranted in the interest of justice if any one of the *Allen* criteria is satisfied. *E.g.*, *U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Tucson, Ariz.*, 64 FLRA 819, 821 (2010) (*Davis-Monthan*).

The Union contends that fees are warranted under the fifth *Allen* criterion. Under that criterion, fees are warranted in the interest of justice when the agency knew or should have known that it would not prevail on the merits when it disciplined the employee. *Allen*, 2 M.S.P.R. at 435. Making this determination requires the arbitrator to evaluate the reasonableness of the agency's actions and positions in light of the information available to it when it disciplined the employee. *U.S. Dep't of Homeland Sec., Immigration & Customs Enforcement*, 64 FLRA 1003, 1006-07 (2010).

In disciplinary actions, the penalty imposed by the agency is an aspect of the merits of an agency's case, and fees are warranted in the interest of justice when the agency knew or should have known that its choice of penalty would not be sustained. *Id.* at 1006. In this regard, both the MSPB and the Authority have found that, when the penalty is mitigated based on evidence before, or readily available to, the agency at the time of the disciplinary action, and no new information was presented at the merits hearing that was not available to the agency at the time of the discipline, such mitigation establishes that the agency knew or should have known that its choice of penalty would not be sustained. *See, e.g., U.S. Dep't of the Air Force, 355 Fighter Wing, Davis-Monthan Air Force Base, Tucson, Ariz.*, 65 FLRA 219, 222 (2010) (Member Beck dissenting) (*355 Fighter Wing)*; *Miller v. Dep't of the Army*, 106 M.S.P.R. 547, 551 (2007) (*Miller)*; *Del Prete v. USPS*, 104 M.S.P.R. 429, 434-35 (2007) (*Del Prete*).

Here, the Arbitrator mitigated the grievant's penalty based on "her long[,] and apparently, effective and conscientious service" of "more than [thirty-five] years[.]" Initial Award at 5. There is no dispute that this evidence was before, or readily available to, the Agency at the time when the Agency imposed the five-day suspension. Thus, the Arbitrator's mitigation of the grievant's penalty based on this evidence establishes that the Agency knew or should have known that its choice of penalty would not be sustained. *See, e.g., 355 Fighter Wing*, 65 FLRA at 222; *Miller*, 106 M.S.P.R. at 551; *Del Prete*, 104 M.S.P.R. at 434-35. Accordingly, consistent with MSPB and Authority precedent, we find that attorney fees are warranted in the interest of justice under the fifth *Allen* criterion, [4] and set aside the awards. [5]

The Authority has consistently held that the arbitrator, not the Authority, is the appropriate authority for resolution of a request for attorney fees. *See, e.g, AFGE, Local 3105*, 63 FLRA 128, 131 (2009) (citing 5 C.F.R. § 550.807(a)). As the Arbitrator did not address the other statutory requirements for an award of attorney fees under the BPA, we remand the awards to the parties for submission to the Arbitrator, absent settlement, to address those requirements. *See AFGE, Local 1592*, 64 FLRA 861, 862 (2010).

V. Decision

The awards are set aside, and this matter is remanded to the parties for resubmission to the Arbitrator, absent settlement.

[4] As an award of fees is warranted in the interest of justice if any one of the *Allen* criteria is satisfied, *see Davis-Monthan*, 64 FLRA at 821, we find it unnecessary to address the Union's contention that attorney fees are warranted under the fourth *Allen* criterion.

[5] In response to the dissent, we emphasize that our decision merely applies MSPB precedent to find that, where an arbitrator mitigates a penalty, and the *mitigation is based on evidence that was known or readily available to the agency at the time of discipline*, attorney fees are required under the fifth *Allen* criterion. *See, e.g.*, *Miller*, 106 M.S.P.R. at 551; *Del Prete*, 104 M.S.P.R. at 434-35. This standard neither requires a "crystal ball" nor results in attorney fees solely based on penalty mitigation. Dissent at 6. Thus, our decision today is wholly consistent with *Matthews v. United States Postal Service*, 78 M.S.P.R. 523 (1988), and *Dunn v. Department of Veterans Affairs*, 98 F.3d 1308 (Fed. Cir. 1996), both of which held that penalty mitigation does not, by itself, demonstrate that the fifth *Allen* criterion is met. *See* 78 M.S.P.R. at 526; 98 F.3d at 1313. Moreover, we note that *Hilliard v. U.S. Postal Serv.*, 111 M.S.P.R. 634 (2009), cited by the dissent, is a non-precedential decision, *see id.* at 634, and, thus, provides no support for the dissent's position. Finally, as discussed above, *Miller* and *Del Prete*, also cited by the dissent, actually support our holding that attorney fees are warranted in this case.

Member Beck, Dissenting:

I disagree with my colleagues that the Arbitrator's denial of attorney fees is contrary to law for the same reasons that I articulated in my dissent in *United States Department of the Air Force, 355 Fighter Wing, Davis-Monthan Air Force Base, Tucson, Arizona*, 65 FLRA 219, 223 (2010) (Dissenting Opinion of Member Beck).

The Majority effectively transforms the "knew or should have known" standard into a standard of "must have a crystal ball to predict precisely how an arbitrator will view the grievance."

The practical consequence of the Majority's Decision today is that, every time an arbitrator disagrees with the agency about the appropriate discipline that should have been imposed for employee misconduct, an award of attorney fees will be mandated. That is not the result that was intended by the Back Pay Act and *Allen*; both clearly contemplate that some analysis and judgment should be applied to the question of whether attorney fees should be awarded, not that fees must be automatically awarded every time an arbitrator sees a disciplinary situation slightly differently from how the agency saw it. *Matthews v. U.S. Postal Serv.*, 78 M.S.P.R. 523, 526 (1998) (*Allen* does not create a presumption or per se rule in favor of fees whenever a penalty is mitigated) (citing *Dunn v. Dep't of Veterans Affairs*, 98 F.3d 1308, 1313 (Fed. Cir. 1996) (*Dunn*)) (a reversal of the agency's action, in itself, does not show that the agency proceeded negligently); *see also Hilliard v. U.S. Postal Serv.*, 111 M.S.P.R 634, 641 (2009) (*Hilliard*) (separate opinion of Member Rose at note 1).

Arbitrators may choose to mitigate a penalty for myriad reasons that do not imply negligence, bad faith, or overreaching by the agency – none of which necessarily indicates that the agency knew or should have known the arbitrator would mitigate the penalty. *Dunn* at 1313 (arbitrator did not abuse his discretion or commit legal error in determining that, although petitioner did prevail, the interests of justice did not warrant an award of fees); *see also Hilliard*, 111 M.S.P.R. at 639 (separate opinion of Chairman McPhie) (citing *Miller v. Dep't of the Army*, 106 M.S.P.R. 547, 551 (2007); *Del Prete v. U.S. Postal Serv.*, 104 M.S.P.R. 429, 434-35 (2007)).

I would deny the Union's exceptions.