

**71 FLRA No. 200**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 446  
(Union)

and

UNITED STATES  
DEPARTMENT OF AGRICULTURE  
FOREST SERVICE  
ASHEVILLE, NORTH CAROLINA  
(Agency)

0-AR-5573

—  
DECISION

October 21, 2020

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

Decision by Member Abbott for the Authority

**I. Statement of the Case**

With 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.<sup>1</sup> Specifically at issue in this case is whether the Union was entitled to attorney fees simply because it successfully challenged a disciplinary action.

Because the Arbitrator correctly applied Authority case law in determining whether attorney fees were warranted in the interest of justice, we find that the denial of attorney fees is consistent with law. Accordingly, we deny the Union's exceptions.

<sup>1</sup> 5 U.S.C. § 7701(g)(1); *see also AFGE, Local 2076*, 71 FLRA 221, 223 (2019) (*Local 2076*) (Member DuBester concurring in part and dissenting in part) (finding that, in the grievance context, the "mitigation of a penalty does not necessarily imply that the agency knew or should have known that its penalty would not be sustained, even if the evidence on which the arbitrator relied was available to the agency at the time of its decision").

**II. Background and Arbitrator's Award**

The underlying grievance concerned a ten-day suspension based on two charges. The Union grieved the suspension. The matter went to arbitration, and the Arbitrator found that the Agency did not have just cause to suspend the grievant for ten days. Specifically, the Arbitrator found that charge one was unsupported by credible evidence and that the grievant's conduct underlying charge two did not rise to the level warranting formal discipline. As a remedy, the Arbitrator reversed the suspension and granted the grievant backpay.

The Union subsequently filed a motion for attorney fees, arguing that an award of attorney fees was warranted in the interest of justice under the *Allen* factors.<sup>2</sup> Specifically, the Union argued that "the action was clearly without merit" and that the employee was "substantially innocent of the charges" (*Allen* factor 2) and that "the Agency knew or should have known that it would not prevail on the merits" (*Allen* factor 5).<sup>3</sup>

The Arbitrator found that an award of attorney fees was not in the interest of justice because the Agency's action was not clearly without merit, the grievant was not substantially innocent, and the Agency did not know, or could not have known, that it would not prevail. In evaluating the *Allen* factors, the Arbitrator found that the Agency had a reasonable basis for disciplining the grievant because the "Agency thoroughly investigated and collected statements from various individuals," and the "statements contained observations that, if true, would constitute a reasonable basis for discipline[e]."<sup>4</sup> The Arbitrator also found that the grievant was not substantially innocent because the

<sup>2</sup> The *Allen* factors are five standards for determining whether an award of attorney fees is warranted in the interest of justice. *Allen v. U.S. Postal Serv.*, 2 M.S.P.R. 420 (1980) (*Allen*). 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 actions are clearly without merit or wholly unfounded, or the employee is substantially innocent of charges brought by the agency;
- (3) the agency 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.

*AFGE, Council 220*, 61 FLRA 582, 583 n.1 (2004) (citations omitted).

<sup>3</sup> Award at 5.

<sup>4</sup> *Id.* at 8.

reasons for reversing the discipline were limited to the Agency failing to meet its burden of proof on charge one and the grievant's actions not warranting discipline on charge two. Finally, the Arbitrator found that the Agency could not have known that it would not prevail on the merits because the Arbitrator's decision rested on credibility determinations of witnesses and evidence that were only determinable at hearing. Based on these conclusions, the Arbitrator denied the Union's motion for attorney fees.

On December 9, 2019, the Union filed exceptions to the Arbitrator's award. The Agency filed an opposition to the Union's exceptions on January 6, 2020.

### III. Analysis and Conclusion: The Arbitrator's denial of attorney fees is consistent with law.

The Union argues that the denial of attorney fees is contrary to Authority case precedent because the Arbitrator "failed to properly entertain . . . [the] request for attorney's fees and denied fees without explanation."<sup>5</sup> After making this assertion, the Union spends the remainder of its brief reiterating its argument that an award of attorney fees is warranted in the interest of justice.<sup>6</sup>

The Union is correct in asserting that an arbitrator cannot prematurely deny a petition for attorney fees<sup>7</sup> and that the Authority requires an arbitrator to "provide a fully articulated, reasoned decision setting forth the specific findings supporting a determination" that attorney fees are warranted in the interest of justice.<sup>8</sup> However, the Union's assertion that the Arbitrator failed to properly entertain its request for attorney fees is wholly without merit. The Union submitted a petition for attorney fees,<sup>9</sup> and the entire award is dedicated to the

request for attorney fees.<sup>10</sup> Furthermore, the Arbitrator acknowledged and addressed each *Allen* factor raised by the Union. The Arbitrator concluded that the Agency's action was not "clearly without merit or wholly unfounded," that the grievant was not substantially innocent, and that the Agency could not have known it would not prevail on the merits.<sup>11</sup> We fail to see how the Arbitrator's fully articulated and well-reasoned denial of attorney fees based on the application of the *Allen* factors is contrary to law.<sup>12</sup> Accordingly, we deny the Union's exception.

### IV. Order

We deny the exception.

<sup>5</sup> Exceptions Br. at 2. The Authority reviews questions of law de novo. *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 conducting a de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party established that they are nonfacts. *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014).

<sup>6</sup> Exceptions Br. at 4-6.

<sup>7</sup> *AFGE, Local 2145*, 71 FLRA 346, 348 (2019) (Member DuBester concurring) (citing *Fraternal Order of Police, Lodge No. 1*, 71 FLRA 6, 7 (2019)).

<sup>8</sup> *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Pollock, La.*, 70 FLRA 195, 196 (2017) (citing *AFGE, Local 2583*, 69 FLRA 538, 539 (2016)).

<sup>9</sup> Exceptions, Attach. 3, Mot. for Attorney Fees.

<sup>10</sup> Award at 2 ("Issues[:] Is the Union entitled to the reimbursement of attorney fees?"); *id.* ("Remedy Sought[:] The Union seeks an award of attorney fees for \$19,156.46.").

<sup>11</sup> *Id.* at 8 (finding that the Agency's action was not "clearly without merit or wholly unfounded" because the Agency had a "reasonable basis for discipline[e]"); *id.* (stating that in the underlying arbitration, he did not find the grievant substantially innocent, but that the Agency could not meet the burden of proof for charge one using hearsay and the "[g]rievant's actions did not rise to the level where discipline was warranted" for charge two); *id.* at 8-9 (finding that the Agency could not have known it would not prevail on the merits because the grievance turned on the credibility of witnesses and the rejection of hearsay evidence).

<sup>12</sup> *Compare AFGE, Local 1482*, 70 FLRA 214, 215 (2017) (finding the denial of attorney fees was appropriate because the arbitrator adopted the detailed analysis in the agency's brief, and therefore, satisfied the requirement to articulate specific findings regarding each requirement for attorney fees) *with Local 2076*, 71 FLRA at 222-24 (finding the denial of attorney fees was inappropriate because the arbitrator failed to provide a fully articulated, reasoned decision supporting the denial).

**Member DuBester, concurring:**

I agree with the Decision to deny the Union's exception.