

71 FLRA No. 201

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2076
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CITIZENSHIP AND IMMIGRATION SERVICES
(Agency)

0-AR-5372
(71 FLRA 221 (2019))

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DECISION

October 22, 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

In this case, we reiterate the standards for determining whether an award of attorney fees is warranted—where the grieved action is disciplinary in nature—under 5 U.S.C. § 7701(g)(1).

Arbitrator James R. Collins denied the Union's request for attorney fees after the grievant's suspension was reduced to five days. He also found that the Union failed to meet any of the relevant factors for awarding attorney fees as established by the Merit Systems Protection Board (Board) in *Allen v. U.S. Postal Service (Allen)*.¹ The Union argues that Arbitrator Collins's denial of attorney fees is contrary to law. We deny this

¹ In *Allen v. U.S. Postal Serv.*, 2 M.S.P.R. 420 (1980) (*Allen*), the 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. *Id.* at 434-35.

exception because Arbitrator Collins's application of the *Allen* factors is consistent with law. The Union also argues that the award fails to draw its essence from the parties' agreement and that it is based on nonfacts. We deny the Union's nonfact exception because the Union fails to establish that Arbitrator Collins's findings are clearly erroneous. We also deny the Union's essence exception because the Union has not demonstrated that Arbitrator Collins's interpretation regarding the start date of the procedural timelines fails to draw its essence from the parties' agreement. Therefore, we deny the Union's exceptions.

II. Background and Arbitrator's Award

After finding that the grievant had been working off the clock without authorization, the Agency suspended the grievant for fourteen days on the charge of failing to follow policy, procedure, rules, and regulations. In response, the Union filed a grievance challenging the suspension. Thereafter, the Union invoked arbitration on behalf of the grievant.

In his award (the merits award), Arbitrator William Croasdale sustained the charge, but mitigated the penalty from a 14-day suspension to a 5-day suspension. He found the grievant's conduct to be merely sloppy record keeping and not intentional. Neither party filed exceptions to the merits award. The Union then filed its first petition for attorney fees. Under the fifth *Allen* factor, the Union asserted that attorney fees were warranted under the interest of justice standard because the Agency should have known that the fourteen-day suspension was too severe. Arbitrator Croasdale denied the Union's first petition for attorney fees in a supplemental award (the supplemental award). The Union filed exceptions to the supplemental award, claiming that the Arbitrator's decision was contrary to law.

On July 10, 2019,² the Authority granted the Union's exception and remanded the supplemental award to the parties because Arbitrator Croasdale failed to make specific findings to support his denial of the Union's first attorney fee petition.³ On remand, the parties mutually selected Arbitrator Collins (the Arbitrator) for the remainder of the proceedings. He then signed a contract for services on September 17. The Union filed a second petition for attorney fees on September 7, and the Agency filed a reply on October 7.

² All dates hereinafter are in 2019 unless otherwise indicated.

³ *AFGE, Local 2076*, 71 FLRA 221, 223 (2019) (*Local 2076*) (Member DuBester concurring in part and dissenting in part).

As relevant here, Article 14(p) of the parties' agreement provides that

(1) Reasonable attorney fees and costs may be awarded in accordance with 5 U.S.C. Section 5596 or other applicable law.

(2) The Union may file a petition for attorney fees within thirty (30) days after an award becomes final and binding if the Union was represented by a licensed attorney. The Union's petition shall be simultaneously served on the Arbitrator and the Agency representative in accordance with this Agreement. The petition must be accompanied by sufficient documentation to enable the arbitrator to determine the reasonableness of the Union's fee request and the amount, if any, to be awarded.

(3) The Agency may file objections to the Union's petition for attorney fees within twenty (20) days of receipt of the Union's request. The objections must be accompanied by supporting documentation and served simultaneously electronically (delivery receipt requested), on the Arbitrator and the Union in accordance with this agreement.⁴

After initially determining that both the petition and the reply were timely due to the fact that his service contract was not signed until September 17, the Arbitrator issued an award (the fee award) denying the Union's petition for attorney fees because the Union failed to show that the grievant was warranted attorney fees under the five *Allen* factors. In particular, he noted that the merits award sustained the Agency's charge that the grievant failed to follow policy, procedure, rules, and regulations. Therefore, he determined that the grievant was not substantially innocent of the charges under the second *Allen* factor. The grievant also testified that her misconduct was unintentional and due to "sloppy work habits."⁵ Therefore, the Union argued that this testimony established, for purposes of the fifth *Allen* factor, that the Agency should have known that a fourteen-day suspension was inappropriate. However, the Arbitrator held that the grievant did not raise her "sloppy work habits" explanation prior to the arbitration hearing.⁶ He also found that the grievant's initial

response to the charge claimed that the grievant was "diligent about recording earned/used credit hours promptly."⁷ As a result, he determined that the Union failed to demonstrate, under the fifth *Allen* factor, that the Agency knew or should have known that it would not succeed on the merits.

Because the Union failed to meet any of the five factors articulated in *Allen*, the Arbitrator denied the Union's second petition and concluded that an award of attorney fees was not warranted in the interest of justice.

The Union filed exceptions to the fee award on December 16. The Agency filed an opposition to the Union's exceptions on January 15, 2020.

III. Analysis and Conclusions

A. The Union fails to demonstrate that the fee award does not draw its essence from the parties' agreement.

The Union argues that the fee award does not draw its essence from the parties' agreement because the Agency's reply was untimely filed.⁸ In particular, the Union alleges that under the parties' agreement, the Agency must submit its reply to the Arbitrator no more than twenty days after the Agency acknowledges receipt of the petition.⁹

As relevant here, the Authority has found that an award fails to draw its essence from a collective-bargaining agreement when an arbitrator's interpretation conflicts with the express provisions of that agreement.¹⁰ Although the Union submitted the petition for attorney fees on September 7, the Arbitrator determined that he "was not authorized to accept service of any motion until the contract for his services was awarded on September 17."¹¹ Further, the parties' agreement required the Union's petition to be "*simultaneously* served on the *Arbitrator and the*

⁴ Exceptions at 13.

⁵ Fee Award at 8.

⁶ *Id.*

⁷ *Id.* at 8-9.

⁸ Exceptions at 12-13. The Authority will find an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the excepting party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *SSA*, 71 FLRA 580, 581 n.9 (2020) (Member DuBester concurring).

⁹ Exceptions at 8-9, 13 ("The Agency may file objections to the Union's petition for attorney fees within twenty (20) days of receipt of the Union's request.").

¹⁰ *NTEU*, Chapter 83, 68 FLRA 945, 948 (2015) (*NTEU*).

¹¹ Fee Award at 5.

Agency.”¹² The Arbitrator found the Agency’s reply was timely because the twenty-day contractual deadline started to run on the day that his service contract was awarded—September 17.¹³

While the Union argues that the Agency’s reply was filed “eight days past the contractual deadline,”¹⁴ the Arbitrator found the Agency’s reply to be timely. Moreover, the Union fails to identify any language in the agreement that prevents the Arbitrator from finding that the procedural deadlines did not start to run when simultaneous service upon the Arbitrator and the Agency was impossible because no Arbitrator was engaged to handle the parties’ dispute. Therefore, we defer to the Arbitrator’s interpretation of the parties’ agreement because the Union has not demonstrated that his interpretation regarding the start date of the procedural timelines fails to draw its essence from the parties’ agreement.¹⁵ We deny the Union’s exception.¹⁶

B. The fee award is not based on nonfacts.

The Union argues that the award is based on nonfacts because the grievant was substantially innocent of the charges, and therefore, the Arbitrator erred when he found that the fourteen-day suspension “was within the Agency’s table of offenses for the misconduct

at issue.”¹⁷ The Union also argues that the award is based on nonfacts because, at the hearing, it disputed that the grievant was made aware of her misconduct four months after the Agency discovered the misconduct.¹⁸ To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.¹⁹

The Union fails to demonstrate that the award is based on nonfacts. While the grievant’s conduct was found to be unintentional, the Agency’s table of penalties plainly demonstrates that a first offense for “a failure to follow policy, procedure, rules, and regulations” can range from a “reprimand to a fourteen-day suspension.”²⁰ Therefore, because the Union does not challenge the fact that the merits award sustained the charge of that offense, the mere fact that the grievant’s conduct was not intentional does not constitute a basis for concluding that the fourteen-day suspension was not within the Agency’s table of penalties.²¹ Moreover, the Authority has held that a mere challenge to the weight accorded testimony does not provide a basis for finding that an award is based on nonfacts.²² Therefore, in the absence of evidence demonstrating that the Arbitrator’s conclusions are clearly erroneous, the Union fails to demonstrate that the Arbitrator’s findings regarding the exact time when the grievant became aware of her misconduct are based on a nonfact.²³ Consequently, we deny the Union’s nonfact exceptions.

¹² Exceptions at 13 (emphasis added).

¹³ See Fee Award at 5 (“For similar reasons, I am not convinced by the Union’s argument that the Agency’s Opposition to the Union’s Application for Attorney Fees was untimely filed.”).

¹⁴ Exceptions at 8.

¹⁵ *NTEU*, 68 FLRA at 949 (finding that the “[u]nion provides no basis for finding that the [a]rbitrator’s interpretation is irrational, unfounded, implausible, or manifestly in disregard of the agreement”).

¹⁶ The Union argues that the Arbitrator exceeded his authority for the same reasons that the award does not draw its essence from the parties’ agreement. Exceptions at 14. Additionally, the Union argues that the Arbitrator’s finding “that he was not allowed to accept case filings [until September 17 is] a demonstration of unacceptable bias in favor of the Agency.” *Id.* at 9-10. However, the Arbitrator applied the same reasoning to find the Union’s petition for attorney fees timely. Fee Award at 5 (finding that the Union’s petition was timely based on the date of his service contract, even though, the parties’ agreement required the petition to be filed by August 9, 2019). As such, the Union’s bias argument amounts to an unsubstantiated claim that the Arbitrator was biased. See *AFGE, Local 3354*, 64 FLRA 330, 333 (2009) (finding the Union’s unsupported statement that arbitrator was biased to be a bare assertion). Moreover, the remainder of the Union’s bias exception merely restates its essence exception. Exceptions at 6-10. Therefore, we do not separately address the Union’s bias and exceeds-authority exceptions because they do nothing more than restate its essence claims. See *AFGE, Local 3627*, 64 FLRA 547, 550 n.3 (2010) (declining to separately address agency’s essence claims, which did nothing more than restate its exceeds-authority claim).

¹⁷ Exceptions at 11.

¹⁸ *Id.* at 10-11. Rather, the Union contended at the hearing that the grievant was not aware of her misconduct until fourteen months after the Agency discovered the misconduct. *Id.* at 11.

¹⁹ *U.S. Dep’t of VA, Bd. of Veterans Appeals*, 68 FLRA 170, 172 (2015).

²⁰ Fee Award at 2.

²¹ *SSA, Office of Hearing Operations*, 71 FLRA 177, 178 (2019) (“The Authority rejects nonfact exceptions that challenge alleged findings that an arbitrator did not actually make.”).

²² *AFGE, Local 1395*, 64 FLRA 622, 625 (2010).

²³ *AFGE, Local 953*, 68 FLRA 644, 646 (2015) (“As a disagreement with the [a]rbitrator’s evaluation of the evidence provides no basis for finding the award deficient, this claim also does not establish that the award is based on a nonfact.”).

- C. The fee award is not contrary to the Back Pay Act and § 7701(g)(1).

Relying on *Lambert v. Department of the Air Force (Lambert)*,²⁴ the Union argues that the fee award is contrary to the Back Pay Act²⁵ and the “interest of justice” standard enumerated in § 7701(g)(1) for attorney-fee awards.²⁶ Pursuant to the second and fifth *Allen* factors,²⁷ the Union argues that Arbitrator Croasdale’s findings in the merits award warrant attorney fees because the Agency should have known that the fourteen-day suspension of the grievant would not be upheld and because the grievant was “substantially innocent” of the charges.²⁸

Recently, in *U.S. DHS, CBP U.S. Border Patrol, El Paso Sector*, we reaffirmed the Authority’s reevaluation of the *Allen* factors and that, although it must adhere to *Allen*’s core tenets, *Allen*’s guidelines must be “adapted” to suit the “context” in which the Authority operates—including disciplinary appeals that do not involve serious adverse actions.²⁹ Furthermore, in *AFGE, Local 2076*, we recently held that the Authority will no longer follow *Lambert* in cases where the arbitrator mitigates a minor disciplinary action.³⁰ Rather, where an arbitrator sustains all of the charges and finds that an agency’s choice of penalty is consistent with its table of penalties, a finding that the agency’s penalty determination was reasonable is strongly supported and the fifth *Allen* factor does not apply.³¹

Here, the Arbitrator’s findings in the fee award clearly demonstrate that attorney fees are not warranted under the fifth *Allen* factor. The Union argues that attorney fees are warranted because Arbitrator Croasdale mitigated the grievant’s suspension from fourteen to five days because her conduct was not “intentional,” but rather was due to “sloppy” work habits.³² Therefore, the Union argues that the Agency should have known that the fourteen-day suspension would not be upheld.³³

However, the Union does not raise a nonfact challenge to the Arbitrator’s finding that the “grievant did not raise ‘sloppy work habits’ to the Agency as the reason for her ‘working off the clock,’ during the investigation.”³⁴ Therefore, because the record clearly demonstrates that the Agency was not aware during the investigation that the grievant was claiming her actions were unintentional, the Agency could not have known that the suspension would be mitigated.³⁵

Moreover, the Arbitrator noted that the grievant was guilty of the charge brought against her and that the Agency’s fourteen-day suspension for a “Failure/Refusal to Follow Orders” was within the table of penalties for a first offense.³⁶ Therefore, consistent with *AFGE, Local 2076*, the mere fact that the grievant’s suspension was mitigated to five days does not demonstrate that the merits award supports an award of attorney fees under the fifth *Allen* factor.³⁷ Accordingly, because the Authority no longer follows *Lambert* in cases where minor discipline has been mitigated, the Union fails to demonstrate that the fee award is contrary to law under the fifth *Allen* factor.

²⁴ 34 M.S.P.R. 501 (1987).

²⁵ 5 U.S.C. § 5596.

²⁶ Exceptions at 4-5. When an exception challenges an award’s consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *AFGE, Local 933*, 70 FLRA 508, 510 n.13 (2018). 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. *Id.* In making that assessment, the Authority defers to the arbitrator’s underlying factual findings unless the excepting party establishes that they are nonfacts. *Id.*

²⁷ *Allen*, 2 M.S.P.R. at 434-35.

²⁸ Exceptions at 4-5.

²⁹ 71 FLRA 597, 599 (2020) (Member DuBester dissenting).

³⁰ *Local 2076*, 71 FLRA at 222-23.

³¹ *Id.*

³² Exceptions at 4-5.

³³ *Id.*

³⁴ Fee Award at 8.

³⁵ *U.S. DHS, U.S. CBP*, 70 FLRA 73, 76 (2016) (*U.S. DHS*) (“Therefore, the [a]rbitrator determined that the deciding official could not have known how the [a]rbitrator, or any other arbitrator, would have viewed this disciplinary proceeding.”).

³⁶ Fee Award at 2.

³⁷ 71 FLRA at 223 (“Circumstances such as this, where all of the charges were sustained and the [a]gency’s choice of penalty was consistent with its table of penalties, strongly support a finding that the [a]gency’s penalty determination was reasonable, and that *Allen* category (5) does not apply.”).

The Union also argues that the grievant was substantially innocent under the second *Allen* factor. An employee is substantially innocent as a matter of law when he or she prevails on substantive rather than technical grounds on the major charges.³⁸ Additionally, an employee is substantially innocent when he or she is essentially without fault for the charges alleged, and was needlessly subjected to attorney fees in order to vindicate herself.³⁹ While the Arbitrator noted that the grievant was not guilty of intentional misconduct, he found that the “[original] arbitrator did not find the grievant substantially innocent of the charge” and that she failed/refused to follow orders.⁴⁰ As a result, because the grievant was not substantially innocent of the only charge brought against her, the Union has failed to demonstrate that the fee award is contrary to law under the second *Allen* factor.⁴¹ Therefore, we deny this exception.

IV. Decision

We deny the Union’s exceptions.

³⁸ *U.S. DHS*, 70 FLRA at 75.

³⁹ *Id.*

⁴⁰ Fee Award at 7.

⁴¹ *AFGE, Local 1061*, 63 FLRA 317, 319-20 (2009) (“Put another way, [substantial innocence] 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.’”).

Member DuBester, concurring:

I agree with the decision to deny the Union's essence, nonfact, exceeded-authority, and bias exceptions. And while I continue to object to the majority's reformulation of the standard used to evaluate the appropriateness of attorney fees under the fifth *Allen* factor in *AFGE, Local 2076*,¹ I agree that the Arbitrator properly denied the Union's request based on his unchallenged finding that the Agency was not aware during the investigation that the grievant was claiming her actions were unintentional.²

¹ 71 FLRA 221, 224 (2019) (Dissenting Opinion of Member DuBester).

² *U.S. DHS, U.S. CBP*, 70 FLRA 73, 76 (2016).