

71 FLRA No. 75

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-5400

DECISION

November 13, 2019

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

I. Statement of the Case

Arbitrator Andrew M. Strongin issued an attorney-fee award granting, in part, and denying, in part, the Union's request for attorney fees incurred in connection with the litigation and settlement of hundreds of disputed overtime offers. Through various settlement agreements, the Union secured over \$400,000 in backpay for the affected employees. The Arbitrator awarded the Union's attorneys approximately \$200,000 for case-representation work and approximately \$25,000 for work related to the attorney-fee dispute (fee dispute).

For the following reasons, we find no basis for reducing the awarded fee for case-representation work, but we reduce, as unreasonable, the number of hours that the Union billed for work related to the fee dispute.

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

In 2013, the Union was pursuing multiple local grievances because the Agency, at several of its locations, was limiting overtime shifts to Saturdays. The Agency refused to process the various local grievances because they "arose out of 'common facts'" and, according to the Agency, would result in duplicative litigation.¹ Thus, the

Union withdrew the local grievances and filed a national grievance encompassing all of the local claims.

In the national grievance, the Union alleged that the Agency violated Article 24, Sections 2.A and 2.D of the parties' master collective-bargaining agreement by limiting overtime to Saturdays. Section 2.D states that the Agency "will permit . . . employees to . . . work overtime on a regular workday,"² and Section 2.A requires the Agency to (1) distribute overtime equitably, and (2) provide affected local unions with "the qualifications and skills identified and general information regarding [available] overtime, including the anticipated number of hours and the days the overtime will be worked."³ The Union also claimed that the Agency's violations of Article 24 were clear and patent and, therefore, constituted an unfair labor practice (ULP) under § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute.⁴

The Union later amended the national grievance to clarify how the Agency violated Section 2.A. Specifically, it alleged that the Agency failed to distribute overtime equitably and failed to provide the locals with information related to the Saturday-only overtime offers, as required by that section. In the amended grievance, the Union further argued that the Agency's practice of limiting overtime to Saturdays discriminated against employees whose religious beliefs required them to abstain from Saturday work, in violation of Title VII of the Civil Rights Act of 1964 (Title VII).⁵

As remedies, the Union requested that the Agency: "cease and desist" from violating Article 24 and Title VII; provide backpay to all affected employees; provide "make whole relief for any additional costs that were incurred by [those] employees ([such as] travel, parking, etc.);" and post a notice stating that the Agency committed a ULP.⁶

The parties failed to resolve the grievance, and the dispute proceeded to arbitration in 2014. Before the Arbitrator, the parties scheduled nine hearing dates. On the first hearing date, the parties agreed to bifurcate the arbitration process (the bifurcation agreement). First, the Arbitrator would issue a decision resolving the parties' dispute over the meaning of Article 24. Second, the parties would attempt to use that decision to settle the various overtime disputes, but if the parties were unable

² Exceptions, Attach. 1, Master Collective-Bargaining Agreement at 87.

³ *Id.*

⁴ 5 U.S.C. § 7116(a)(1), (5).

⁵ 42 U.S.C. §§ 2000e to 2000e-17.

⁶ Award at 5; Exceptions, Attach. 3, Opp'n to Fee Pet., Ex. 2, Am. Grievance at 2.

¹ Award at 2.

to settle, then they would resubmit the grievance to the Arbitrator.

The parties spent two days before the Arbitrator disputing the meaning of Article 24. In 2015, the Arbitrator issued an award interpreting Article 24 in a manner that “favored the Union’s proffered interpretation.”⁷ Consistent with the bifurcation agreement, the parties began settlement discussions. And in 2016, the parties agreed that any settlements would occur at the local level. Specifically, they agreed that the local unions would identify Saturday-only overtime offers that affected their locals and, if the Agency agreed that there had been a violation, then it would provide the affected employees with backpay.

After approximately one year, the settlement discussions resulted in several local agreements that provided backpay to eligible employees at various Agency locations, but did not resolve the disputes at all locations. Each of the local agreements stated that (1) it represented a full resolution of the claims, for that location, arising out of the national grievance, and (2) the Agency did not admit to violating “any statute, regulation, rule, . . . or the [master] agreement.”⁸

For the locations where the parties did not reach a settlement, the parties resubmitted the national grievance to the Arbitrator, per the bifurcation agreement. The Arbitrator scheduled six hearing days. In 2017, during the hearing, the parties settled the remaining disputes. Once finalized, the various local settlement agreements awarded over \$400,000 in backpay to hundreds of Agency employees.

A few months later, the parties entered into an attorney-fee agreement stipulating that the Agency would pay the Union’s “reasonable attorney’s fees.”⁹ However, after the parties were unable to agree on an amount of reasonable fees, the Union filed a fee petition with the Arbitrator, seeking fees for three attorneys.

B. Arbitrator’s Award

In response to the Union’s fee petition, the Agency filed an opposition, and, with the Arbitrator’s permission, the Union filed a reply to the opposition; the Agency filed a surreply; and the Union filed a reply to the Agency’s surreply.

Before the Arbitrator, the parties primarily focused on the hours worked by one of the Union’s three attorneys (Attorney A). The Union claimed that

Attorney A had worked 365 hours on case representation; seventeen hours and thirty minutes on the fee petition; twenty-five hours on the reply to the opposition; and seventeen hours on the reply to the surreply.

In its opposition to the fee petition, the Agency identified twenty-two entries in Attorney A’s billing records, totaling 106.5 hours, labeled as either “[h]earing prep[aration]” or “[p]reparation for . . . hearing.”¹⁰ The Agency contended that the Arbitrator should exclude the 106.5 hours because (1) those descriptions were not sufficiently specific to demonstrate that the hours were reasonable, and (2) the amount of time that Attorney A devoted to those tasks was excessive.

In its reply to the opposition, Attorney A submitted eight pages of reconstructed billing records, describing the particular activities that she performed during those 106.5 hours. And, in an accompanying affidavit, Attorney A stated that she used other documents – such as, “emails, electronic documents, and physical files” – to reconstruct her records.¹¹

The Arbitrator credited Attorney A’s sworn statement and found that she had reconstructed the 106.5 hours by examining “contemporaneous[]” records that “accurately reflect[ed]” how she spent that time.¹² Thus, the Arbitrator concluded that the reconstructed billing records were adequate to determine whether Attorney A reasonably expended the 106.5 hours.

As for the reasonableness of those hours, the Arbitrator described the case as “complex[and] multi-faceted.”¹³ He noted that the parties had scheduled “nine hearing days to address . . . a national grievance challenging hundreds of overtime offers affecting five functions [of the Agency] in . . . eight geographic locations.”¹⁴ In addition, the Arbitrator observed that the Union had to prepare “for a broad-based presentation on contractual interpretation” and to respond to the Agency’s “blanket position” that the Agency limited overtime to Saturdays “for one or more of five legitimate business reasons.”¹⁵ Given the difficulty and scope of the case, the Arbitrator concluded that Attorney A’s 106.5 hours of hearing preparation was reasonable.

The Arbitrator next addressed the Agency’s contention that the Union could not recover fees for any

⁷ Award at 8 (not providing the interpretation of Article 24).

⁸ *E.g.*, Exceptions, Attach. 2, Fee Pet., Attach. 3, Local Agreement at 2; *see also* Award at 11.

⁹ Fee Pet., Attach. 13, Fee Agreement at 1.

¹⁰ Opp’n to Fee Pet. at 9-11; *see also* Award at 17.

¹¹ Exceptions, Attach. 4, Reply to Opp’n to Fee Pet., Attach. 1, Aff. at 2.

¹² Award at 25.

¹³ *Id.* at 26.

¹⁴ *Id.*

¹⁵ *Id.*

hours spent on unsuccessful claims that were distinct from its successful claims. Relying on the U.S. Supreme Court's decision in *Hensley v. Eckerhart* (*Hensley*),¹⁶ the Agency claimed that the Union's national grievance alleged *five distinct* claims, and the local settlement agreements resolved only one of those claims. Therefore, the Agency argued, the Arbitrator should reduce the hours expended by the Union's attorneys by 80%, to reflect the Union's lack of success. In response, the Union alleged that the grievance raised *four related* claims.

The Arbitrator noted that under *Hensley*,

the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. [But w]here a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised.¹⁷

Applying *Hensley*, the Arbitrator appeared to find that the Union alleged four – not five – claims. More importantly, the Arbitrator determined that the Union's claims were related because they shared a common core of fact. Specifically, he found that each claim arose from the Agency limiting overtime offers to Saturdays. And in the Arbitrator's view, the Agency essentially conceded as much by refusing to process the Union's separate local grievances because they "arose out of 'common facts.'"¹⁸

After determining that the Union's claims were related, the Arbitrator examined the Union's degree of success. He found that the alleged violations of Sections 2.A and 2.D were at the heart of the Union's grievance, and the Union succeeded by obtaining "over \$400,000 in backpay" for the affected employees.¹⁹ Although the Union did not secure a cease-and-desist order or a notice posting, the Arbitrator concluded that the Union's success was "substantial"²⁰ because the \$400,000 backpay remedy affected hundreds of employees

over "eight geographic locations";²¹ the payment of that money would provide "notice to employees that the Union . . . vindicated their . . . rights;"²² and *all* of the Union's claims contributed to the backpay remedy.²³ Accordingly, the Arbitrator did not reduce the Union's requested attorney fees based on the alleged lack of success.

Before the Arbitrator, the Agency also contended that the amount of time that Attorney A spent working on the reply to the opposition was unreasonable. As noted above, the Union requested compensation for twenty-five hours of work on that filing. Of those twenty-five hours, the Arbitrator observed that Attorney A spent (1) thirty minutes modifying her original attorney-fee calculation in response to the Agency's opposition – which identified a calculation error; (2) two hours and thirty minutes reconstructing her billing records for the 106.5 hours of hearing preparation; and (3) one hour preparing an explanation as to why those reconstructed records were adequate. The Arbitrator determined that the Agency should not bear the cost of that time, because Attorney A spent those four hours correcting the original fee petition. Thus, the Arbitrator reduced the twenty-five hours to twenty-one hours.

Using the United States Attorney's Office attorney's fees matrix (USAO matrix),²⁴ the Arbitrator awarded a total of \$223,490.45 in attorney fees to the Union's attorneys, including approximately \$200,000 for case representation; and \$11,823 for Attorney A's work on the reply to the opposition and \$9,571 for her work on the reply to the surreply.

On August 8, 2018, the Agency filed exceptions to the award, and on September 7, 2018, the Union filed an opposition to the exceptions.

III. Analysis and Conclusions

As provided in more detail below, the Agency contends that the award is contrary to law.²⁵ When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award *de novo*.²⁶ In applying the

¹⁶ 461 U.S. 424 (1983).

¹⁷ Award at 33-34 (quoting *Hensley*, 461 U.S. at 440).

¹⁸ *Id.* at 2.

¹⁹ *Id.* at 28.

²⁰ *Id.* at 29.

²¹ *Id.* at 35.

²² *Id.* at 36.

²³ *Id.* (observing that the local settlement agreements represented a "full and complete settlement of the [Union's] overtime claims").

²⁴ The USAO matrix is a table that provides hourly rates, based on years of experience, for attorneys in the Washington, D.C. area. *Id.* at 14.

²⁵ Exceptions Br. at 9-28.

²⁶ SSA, 64 FLRA 630, 632 (2010) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).

standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.²⁷ In making that assessment, the Authority defers to the arbitrator's underlying factual findings.²⁸

The Back Pay Act (the Act) requires that an award of attorney fees be: (1) in conjunction with an award of backpay on correction of the personnel action; (2) reasonable and related to the personnel action; and (3) in accordance with the standards established under 5 U.S.C. § 7701(g)(1).²⁹ Section 7701(g)(1) requires that: (1) the employee must be the prevailing party; (2) the award of fees must be warranted in the interest of justice; (3) the amount of the fees must be reasonable; and (4) the fees must have been incurred by the employee.³⁰ And when resolving exceptions to attorney-fee awards under Act, the Authority is "constrained to follow the same standards" applied by the Merit Systems Protection Board (MSPB) and the U.S. Court of Appeals for the Federal Circuit under § 7701(g).³¹

Here, it is uncontested that the Agency agreed – as part of the attorney-fee agreement – to pay the Union's reasonable attorney fees.³² The Arbitrator expressly found that the Agency conceded the "foundational question" of whether attorney fees were "warranted" under the Act, including whether an award of fees would be in the interest of justice.³³ And the Agency does not dispute that it retained, through the fee agreement, only the right to contest the reasonableness of the fees. Nor does the Agency make *any* arguments related to the interest-of-justice factors in its exceptions.³⁴

²⁷ *Id.* (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (*DOD*)).

²⁸ *Id.* (citing *DOD*, 55 FLRA at 40).

²⁹ 5 U.S.C. § 5596(b)(1)(A)(ii); *see also AFGE, Council of Prison Locals, Local 1010*, 70 FLRA 8, 9 (2016).

³⁰ 5 U.S.C. § 7701(g)(1).

³¹ *AFGE, Local 1633*, 71 FLRA 211, 215 (2019) (*Local 1633*) (Member Abbott concurring; Member DuBester concurring in part and dissenting in part). Member DuBester notes that he dissented from the majority's decision in *Local 1633* to modify the standards used to determine whether attorney fees are warranted in arbitration awards in which the grieved action is not disciplinary in nature. However, as our decision today acknowledges, we do not apply that analysis in resolving this case.

³² Fee Agreement at 1.

³³ Award at 13; *see also id.* at 21 (finding that "the Agency concede[d] that the Union is a 'prevailing party' for purposes of the . . . Act").

³⁴ The dissent asserts that this case should be remanded for the parties to have *another* hearing to contest, for the first time, whether fees are warranted in the interest of justice. A remand would not only be inconsistent with the terms of the fee agreement – and the parties' clear understanding of it – but

Therefore, the *only* matter at issue is whether the awarded attorney fees are reasonable.³⁵

"The most useful starting point for determining the amount of a reasonable [attorney] fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."³⁶ Because the Agency conceded that the USAO matrix is proper for determining the Union attorneys' hourly rate,³⁷ we focus only on whether the claimed hours were reasonably expended.

- A. The awarded attorney fees for case representation are not contrary to law.
 - i. The 106.5 hours of hearing preparation.

In its exceptions, the Agency argues that the Arbitrator erred by awarding Attorney A fees for the 106.5 hours that she spent on "hearing preparation."³⁸ Specifically, the Agency claims that the award is contrary to law because (1) the Arbitrator accepted Attorney A's reconstructed billing records – which specified the particular activities that Attorney A performed during that time,³⁹ and (2) the 106.5 hours were excessive and duplicative of other work.⁴⁰

Regarding the first argument, the MSPB permits reconstructed billing records that are supported by an affidavit and based on the attorney's review of other relevant documents.⁴¹ And both the MSPB and the Federal Circuit have stated that when a specific deficiency has been identified in an attorney-fee petition – such as inadequate documentation – the presiding

would also result in additional attorney fees *for both sides*. As noted above, the parties have been disputing this matter since 2013. Prolonging it, simply so the parties can address an undisputed issue, in no way contributes to an effective and efficient government.

³⁵ The Authority recently clarified the appropriate interest-of-justice analysis in non-disciplinary attorney-fee cases. *See Local 1633*, 71 FLRA at 216-17. However, because the parties agreed that the only matter in dispute is the reasonableness of the fees, we do not apply that analysis here. Fee Agreement at 1.

³⁶ *Hensley*, 461 U.S. at 433.

³⁷ Award at 22.

³⁸ Exceptions Br. at 10.

³⁹ *Id.* at 13.

⁴⁰ *Id.* at 11-12.

⁴¹ *Wilson v. Dep't of Transp., FAA*, 22 M.S.P.R. 435, 437-38 (1984) (*DOT*); *see also PPG Indus. v. Celanese Polymer Specialties Co.*, 840 F.2d 1565, 1570 (Fed. Cir. 1988) ("While contemporaneous time records are the most desirable way of proving time spent, such [records are] not the only means." (citation omitted)).

official must afford the petitioning party an opportunity to correct that deficiency.⁴²

Here, Attorney A submitted eight pages of reconstructed billing records that clarified how she spent the 106.5 hours of hearing preparation.⁴³ And the Arbitrator (1) credited Attorney A's sworn affidavit that she reconstructed her records based on contemporaneous "emails, electronic documents, and physical files,"⁴⁴ and (2) determined that the reconstructed records were sufficiently detailed to evaluate the reasonableness of the hours.⁴⁵ Consistent with MSPB and Federal Circuit precedent, the Arbitrator did not err by permitting Attorney A to submit, and then considering, the reconstructed records.⁴⁶

As for reasonableness of those hours, the Authority has stated – relying on MSPB precedent – that because arbitrators are "in the best position to determine whether the number of hours expended [was] reasonable," it reviews those determinations under a "deferential" standard.⁴⁷ And the MSPB has held that "absent a specific showing that the [presiding official's] evaluation was incorrect, [that evaluation] will not [be] second-guess[ed]."⁴⁸ Applying that precedent, the Authority has rejected unsupported exceptions to the number of hours that an arbitrator awarded an attorney.⁴⁹

The Arbitrator found that the 106.5 hours were reasonable because: the case was "complex[and] multi-faceted";⁵⁰ the parties had to prepare for "nine hearing days to address . . . a national grievance challenging hundreds of overtime offers affecting five functions [of the Agency] in . . . eight geographic locations";⁵¹ and the Union had to prepare "for a broad-based presentation on contractual interpretation" and to respond to the Agency's "blanket position" that it limited overtime to Saturdays "for one or more of five legitimate business reasons."⁵² The Agency does not dispute that characterization of the case. Instead, it simply asserts that *all* of the 106.5 hours were excessive.⁵³ However, "simply stat[ing] that . . . hours spent . . . were 'excessive'" does not demonstrate that the hours were actually excessive or that the fee award is contrary to law.⁵⁴ Moreover, upon review of the reconstructed records, Attorney A spent the 106.5 hours performing tasks that are appropriately categorized as hearing preparation, such as communicating with various witnesses, preparing an opening statement, creating and reviewing exhibits, and drafting direct-examination questions.⁵⁵

Although the Agency claims that Attorney A performed work that was duplicative of other work during the 106.5 hours,⁵⁶ "[i]t is only where the lawyer does unnecessarily duplicative work that the court may legitimately cut the hours."⁵⁷ And here, changes to the hearing schedule resulted in a large amount of hearing-preparation work. As the Arbitrator observed, the parties originally scheduled nine hearing dates to address all of the claims raised in the grievance.⁵⁸ But after just two hearing days, the parties began settlement discussions, per the bifurcation agreement, that lasted over a year. Then, the parties scheduled another six hearing days.⁵⁹ At that time, both parties had to prepare, or re-prepare, for hearing. Thus, even if some of

⁴² *Wilson v. Dep't of HHS*, 834 F.2d 1011, 1012 (Fed. Cir. 1987); see also *Martinez v. U.S. Postal Serv.*, 89 M.S.P.R. 152, 159 (2001) ("[B]efore an administrative judge decides . . . to reject claims in an attorney[-]fees application, he should communicate his concerns to the appellant and allow . . . an opportunity to correct the specific deficiencies identified.").

⁴³ Aff., Attach. 1, Reconstructed Records at 1-8.

⁴⁴ Award at 27.

⁴⁵ *Id.* (finding that the records provided "ample specificity").

⁴⁶ See *DOT*, 22 M.S.P.R. at 437-38 (accepting reconstructed billing records, supported by affidavit, and noting that such records are permissible when based on review of "correspondence, pleadings, briefs and other papers on file"); see also *Gagon v. United Technisource, Inc.*, 607 F.3d 1036, 1044 (5th Cir. 2010) (accepting non-contemporaneous billing record that was "detailed" and supported by "affidavits that describe[d] the time [the] attorney spent"); *Johnson v. Univ. Coll. of the Univ. of Ala. in Birmingham*, 706 F.2d 1205, 1207 (11th Cir. 1983) (where attorney did not submit contemporaneous billing record for 100 hours of work, the court found it sufficient that the attorney reconstructed that time based on "diary entries and work product found in her files"); cf. *N.J. v. EPA*, 703 F.3d 110, 114 (D.C. Cir. 2012) (refusing to accept reconstructed records that stated only that "the attorneys were working to 'comprehend the scientific, factual, and legal issues that were central to the case'").

⁴⁷ *U.S. DHS, ICE*, 64 FLRA 1003, 1008 (2010) (*ICE*) (quoting *McKenna v. Dep't of Navy*, 108 M.S.P.R. 404, 411 (2008)).

⁴⁸ *McKenna*, 108 M.S.P.R. at 411.

⁴⁹ *ICE*, 64 FLRA at 1008.

⁵⁰ Award at 26.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Exceptions Br. at 12.

⁵⁴ *Radtke v. Caschetta*, 254 F. Supp. 3d 163, 178 (D.D.C. 2017) (finding that the opposing party must direct the court to specific time entries and explain why the hours spent are unreasonable); see also *ICE*, 64 FLRA at 1008 (finding claim that hours requested were "unnecessary" does not demonstrate that the arbitrator's fee award is contrary to law).

⁵⁵ See Reconstructed Records at 1-8.

⁵⁶ Exceptions Br. at 11-12.

⁵⁷ *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112-13 (9th Cir. 2008).

⁵⁸ Award at 6.

⁵⁹ *Id.* at 11.

Attorney A's hearing-preparation work was duplicative, it does not appear to be unnecessarily duplicative.⁶⁰

Based on the above, we find that the Agency has not demonstrated that the 106.5 hours are unreasonable.

- ii. The degree of the Union's success.

Next, the Agency contends that the Arbitrator erred by awarding attorney fees for what it alleges are the Union's unsuccessful claims.⁶¹ Relying on *Hensley*, the Agency asserts that the Union's claims were distinct,⁶² the Union succeeded only on one of its claims;⁶³ and the Authority should proportionately reduce the fee award to reflect the Union's lack of success.⁶⁴

In *Hensley*, the Court stated that "the most critical factor" in determining the reasonableness of a fee award "is the degree of success obtained."⁶⁵ If a party "fail[s] to prevail on a claim that is distinct in *all respects* from his successful claims, the[n] the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee."⁶⁶ But where a prevailing party makes more than one claim, and the claims involve a "common core of facts" or are "based on related legal theories," the Court stated that the fee determination should reflect the significance of the overall relief obtained in relation to the hours reasonably expended.⁶⁷

We find that the Union's claims arose from a common core of fact: the Agency limiting overtime to Saturdays. In the national grievance, the Union contended that *by limiting overtime to Saturdays*, the Agency violated: Section 2.A's mandate to distribute overtime equitably; Section 2.D's requirement to

"permit . . . employees to . . . work overtime on a regular workday"; and Title VII.⁶⁸ Although the Union also alleged that the Agency violated Section 2.A by failing to provide the affected locals with the information required by that section,⁶⁹ that allegation – like the others – was brought *because* the Agency limited overtime offers to Saturdays. In addition, the Union's claim that the Agency committed a ULP was predicated on its claims that the Agency violated Article 24.⁷⁰ Thus, the ULP claim was legally dependent on the Union's contractual claims.⁷¹

The Agency argues that *U.S. Department of HHS, Gallup Indian Medical Center, Navajo Area Indian Health Service (HHS)*⁷² supports its contention that the Union's claims should be treated as distinct.⁷³ However, unlike the union counsel in *HHS*, the Union attorneys here devoted their time to the litigation as a whole. And, under *Hensley*, when counsel's time is *not* "expended on a claim-by-claim basis," the "lawsuit *cannot* be viewed as a series of discrete claims."⁷⁴ We must apply the Court's precedent.

⁶⁰ See *Moreno*, 534 F.3d at 1112-13 (courts should "certainly expect[] some degree of duplication as an inherent part of the process").

⁶¹ Exceptions Br. at 15-16.

⁶² *Id.* at 17-18.

⁶³ *Id.* at 19.

⁶⁴ *Id.* at 15 (based on its contention that the Union succeeded on only one of its five claims, the Agency argues that an 80% reduction is proper, regardless of the number of hours that the Union attorneys spent on those allegedly unsuccessful claims). Even if we agreed that the Union's claims were distinct, the Court in *Hensley* expressly rejected a reduction based on a ratio of successful to unsuccessful claims. 461 U.S. at 435 n.11; see also *Guy v. Dep't of Army*, 118 M.S.P.R. 45, 55 (2012) ("The fact that the appellant prevailed on one of five personnel actions does not entail that he should be awarded only a similar fraction of the fees requested." (citing *Hensley*, 461 U.S. at 434-35)).

⁶⁵ 461 U.S. at 436.

⁶⁶ *Id.* at 440 (emphasis added).

⁶⁷ *Id.* at 435.

⁶⁸ Am. Grievance at 1-2.

⁶⁹ *Id.* at 1.

⁷⁰ Award at 30.

⁷¹ See *AFGE, Local 2241*, 49 FLRA 1403, 1406 (1994) (finding racial discrimination claim related to contractual claim, as both challenged the agency's decision to suspend the grievant); *Morey v. Dep't of the Navy*, 55 M.S.P.R. 604, 608 (1992) (finding discrimination claim "inextricably interwoven" with suspension claim because those claims were "based on the same facts").

⁷² 60 FLRA 202 (2004) (Member Pope dissenting).

⁷³ Exceptions Br. at 16-17.

⁷⁴ 461 U.S. at 435 (emphasis added) (also noting that "[i]t may well be that cases involving . . . unrelated claims are unlikely to arise with great frequency").

Accordingly, *HHS* is not dispositive, and we conclude that the Union's claims are related.⁷⁵

Because the Union's claims are related, we must now consider whether the awarded fee is reasonable in light of the level of the Union's success.⁷⁶ Where, as here, "a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because [he did not prevail on] each contention."⁷⁷ The Court has stated that parties may raise alternative legal grounds, "and [a] court's rejection of[,] or failure to reach[,] certain grounds is not a sufficient reason for reducing a fee."⁷⁸ However, if a party "has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount."⁷⁹

To determine whether the Union achieved substantial success or limited success, we look first to the local settlement agreements. None of those agreements mention the specific claims against the Agency. And although the local agreements state that they represent a *full* resolution of the claims arising out of the national grievance, they also provide that the Agency does not admit to violating "any statute, regulation, rule, . . . or the [master] agreement."⁸⁰ Therefore, the local

settlement agreements do not provide any indication as to the degree of the Union's success on a specific claim.⁸¹ Accordingly, to determine the degree of the Union's success, it is necessary to consider whether the relief that the Union obtained through the settlements was *significantly* less than what it originally sought.⁸²

The Union sought the following remedies in its grievance: a "cease and desist" order; backpay to all affected employees; and a notice posting stating that the Agency committed a ULP.⁸³ Through the local settlement agreements, the Union obtained only the backpay remedy, but it was able to secure over \$400,000 in backpay for hundreds of employees over "eight geographic locations."⁸⁴ We agree with the Arbitrator that the value of the backpay remedy is "substantial"⁸⁵ and not significantly diminished by the Union's failure to obtain a cease-and-desist order or a notice posting. As the Arbitrator found, the payment of the backpay remedy will provide notice to employees that the Agency erred⁸⁶ and presumably deter the Agency from engaging in similar conduct in the future.⁸⁷ Thus, although the Union did not obtain the precise relief that it initially requested, we cannot find that it achieved only limited success warranting a reduction in the awarded fee.⁸⁸

⁷⁵ See *Smit v. Dep't of Treasury*, 61 M.S.P.R. 612, 619 (1994) (finding three claims "related" because they "involved a common core of facts relating to the appellant's status as a whistleblower"). The Agency also reintroduces its contention that the Union pursued five, as opposed to four, claims. Exceptions Br. at 15, 17-18. Specifically, it argues that to the extent that the Arbitrator found that the Union raised four claims, that finding is based on a nonfact. *Id.* at 15 n.8 (stating that the Arbitrator appeared to adopt the Union's argument that it alleged four claims in the national grievance). 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. *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993). Even assuming that the Arbitrator's determination on the number of claims is a factual finding, he concluded that the Union's claims were *related*. Award at 36. Thus, the Arbitrator's determination on the *number* of claims did not affect the conclusion that the Union was entitled to attorney fees for its related claims. As the Agency has not established that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result, we deny this exception.

⁷⁶ *Hensley*, 461 U.S. at 440.

⁷⁷ *Id.*

⁷⁸ *Id.* at 435; see also *Taylor v. DOJ*, 69 M.S.P.R. 299, 304-05 (1996) ("[A]ttorney time spent formulating an unsuccessful argument . . . is compensable.").

⁷⁹ *Hensley*, 461 U.S. at 436.

⁸⁰ E.g., Exceptions, Attach. 2, Fee Pet., Attach. 3, Local Agreement at 2; see also Award at 11.

⁸¹ See *Ill. Welfare Rights Org. v. Miller*, 723 F.2d 564, 567 (7th Cir. 1983) ("Although some settlement agreements may be structured so that they dispose of the original claims in a way that allows the court to decide whether a particular claim has been ultimately successful or unsuccessful, this will not always be the case. Indeed, many settlements will be informally structured with an eye toward the achievement of overall objectives . . .").

⁸² *U.S. DOD Dependents Sch.*, 54 FLRA 773, 791 (1998) (stating that "it is necessary to consider whether a fee award should be reduced because the relief ordered was significantly less than what was sought" (citing *Stein v. U.S. Postal Serv.*, 65 M.S.P.R. 685, 690 (1994))).

⁸³ Am. Grievance at 2.

⁸⁴ Award at 35.

⁸⁵ *Id.* at 29. Although the Union also requested, but did not obtain, "any additional costs that were incurred" by employees affected by the Agency limiting overtime to Saturdays, neither the Union nor the Agency provide any additional details regarding that remedial request. *Id.* at 5. Accordingly, we cannot conclude that the Union's failure to obtain that remedy minimizes the significance of the \$400,000 backpay remedy.

⁸⁶ *Id.* at 36.

⁸⁷ *Id.*

⁸⁸ See *Grant v. Martinez*, 973 F.2d 96, 99, 101 (2d Cir. 1992) (awarding \$512,590.02 in attorneys' fees on settlement of \$60,000, and declining to find that the appellant achieved only limited success, even though "they failed to receive all the relief [that] they requested").

In sum, there is no basis for reducing the awarded fee based on the Union's degree of success.⁸⁹ As such, we deny this exception.

- B. The attorney fees awarded for work on the reply to the opposition and reply to the surreply are unreasonable.

As noted above, the Arbitrator awarded Attorney A \$11,823 for twenty-one hours of work on the reply to the opposition and \$9,571 for seventeen hours of work on the reply to the surreply.⁹⁰ The Agency argues that it was "[in]appropriate" for the Union to submit those supplemental briefs, and, therefore, the Arbitrator erred by awarding attorney fees for that work.⁹¹

Because the parties' fee dispute presented some complex legal questions, and the Agency submitted a surreply to the Union's reply to the opposition, it was appropriate for the Union to submit the supplemental filings.⁹² However, as the Court in *Hensley* stated, "[a] request for attorney's fees should not result in a second major litigation."⁹³ And by awarding Attorney A \$21,394 for work on filings that are ancillary to the underlying controversy, the award encourages the type of protracted litigation over fee applications that the Court seeks to avoid. For the most part, the Union's fee petition should have sufficiently set forth its contentions regarding any entitlement to fees. But Attorney A billed forty-two hours working on the supplemental filings⁹⁴ – which is excessively disproportionate to the seventeen hours and thirty minutes that she spent on the fee petition.⁹⁵

Based on the above, we find that the award is contrary to law,⁹⁶ and the awarded fees for work of the supplemental filings are excessive. Accordingly, we grant the Agency's exception and reduce the hours spent on the reply to the opposition and the reply to the surreply to only seventeen hours and thirty minutes –

giving the Union the same amount of time for those submissions as it had on the fee petition.⁹⁷

IV. Decision

We deny, in part, and grant, in part, the Agency's exceptions, and we modify the amount of awarded fees.

⁸⁹ See *Naekel v. Dep't of Transp.*, 884 F.2d 1378, 1379 (Fed. Cir. 1989) (finding a fractional division of an attorney-fee award not appropriate where the appellant, who succeeded on four of six compliance issues, "prevailed in the main . . . although he did not receive all the relief he requested").

⁹⁰ See Award at 39, 41-43.

⁹¹ Exceptions Br. at 28.

⁹² Cf. *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 958 (1st Cir. 1984) (defendant's vigorous opposition to fee petition supported the hiring of, and seeking compensation for, a special counsel to assist with the attorney-fee dispute).

⁹³ *Hensley*, 461 U.S. at 437.

⁹⁴ Exceptions, Attach. 6, Reply to Surreply, Attach. 1, Aff. of Fees for Reply to Surreply at 2; Reply to Opp'n to Fee Pet., Attach. 3, Fees for Reply to Opp'n to Fee Pet.

⁹⁵ Fee Pet., Attach. 19, Billing Records at 9.

⁹⁶ *Hensley*, 461 U.S. at 437 ("A request for attorney's fees should not result in a second major litigation.").

⁹⁷ See *Luessenhop v. Clinton Cnty. N.Y.*, 558 F. Supp. 2d 247, 271 (N.D. N.Y. 2008) (reducing hours spent on fee petition by thirty-six hours); *Greenfield Mills, Inc. v. Carter*, 569 F. Supp. 2d 737, 754 (N.D. Ind. 2008) (reducing hours spent on fee petition by fifty-one hours).

Member Abbott, dissenting:

I do not agree with the central premises upon which my colleagues rely – that the *only factor* in dispute is whether the awarded attorney fees are “reasonable”¹ and that this case may be resolved without applying our precedent in *AFGE, Local 1633 (Local 1633)*.²

As part of the fee-petition agreement, the Agency agreed to pay “reasonable” fees *if* the parties were able to agree to the amount of fees but also that *if* “NTEU files a fee petition . . . the parties *retain the right* to make *any and all arguments* as to the reasonableness of the claimed fees.”³ While I agree that the addition of the phrase – “as to the reasonableness of the claimed fees” – to the fee-petition agreement,⁴ at first blush, appears to create some confusion, the insertion of that language must be evaluated in light of Article 44, Section 1 of the parties’ collective-bargaining agreement (CBA).

First, the parties agreed in Article 44, Section 1 that questions concerning “prevailing party” and “warranted in the interest of justice” must be addressed in order to determine whether “reasonable attorney fees” are warranted.⁵ In light of that provision, I cannot conclude that the Agency’s arguments concerning “prevailing party” and “reasonableness” can be answered outside of the context of the Back Pay Act (BPA)⁶ which also requires an analysis of such requirements as “employee must have incurred” *and* “interest of justice” considerations.⁷

Second, the only fact that is “uncontested” here is that the Agency entered into an agreement concerning fees.⁸ The Agency did not agree, in either the fee-petition agreement or in its arguments to the Arbitrator or us that the only question to be resolved is the reasonableness of the fee petition. As noted above, the fee-petition agreement specified that – “*if* the parties cannot agree to the amount of fees” (which they did not) and *if* the Union “files a fee petition” (which it did) – “the parties retain the right to make any and all arguments as to the reasonableness of the claimed fees.”⁹ On this point, the Agency argues in its exceptions that it “agreed to pay

only [the Union’s] reasonable fees, which of necessity means *only fees warranted pursuant to the BPA and [Article 44, Section 1]*.”¹⁰

Therefore, I do not agree with the majority that the question concerning fees is “uncontested.”¹¹

I also do not agree that this case may be resolved without consideration of *Local 1633*.¹²

In *Local 1633*, we took great pains “to clarify” when attorney fees are warranted in arbitration proceedings “where the grieved action is not disciplinary in nature.”¹³ We held that with “any request for attorney fees under the BPA and § 7701(g)(1), the arbitrator must make a specific finding setting forth the reasons payment of fees is or is not warranted in the interest of justice.”¹⁴ It is not surprising that the Agency does not make specific arguments to us concerning interest of justice factors because *Local 1633* had not been issued when the Agency made its arguments to the Arbitrator and to us in its exceptions. As noted above, however, the Agency does assert in its exceptions that it agreed to pay “only fees warranted pursuant to the BPA and the parties’ [CBA],” which requires the consideration of interest of justice factors.¹⁵

Thus, I would remand this case back to the parties for the arbitrator to analyze the fee petition applying our precedent in *Local 1633*,¹⁶ addressing whether:

- the Agency knew or should have known it would not prevail.¹⁷
- the Agency’s decisions were clearly without merit.¹⁸

¹ Majority at 7.

² 71 FLRA 211 (2019) (Member Abbott concurring; Member DuBester concurring in part and dissenting in part).

³ Exceptions, Attach. 2, Fee Pet., Attach. 13, Fee Pet. Agreement at 1 (Fee Pet. Agreement).

⁴ *Id.*

⁵ Exceptions, Attach. 1, Union Pet. for Attorney Fees, Attach. 22, CBA at 136 (CBA).

⁶ 5 U.S.C. § 5596(b)(1)(A)(ii); *see id.* § 7701(g)(1).

⁷ *Local 1633*, 71 FLRA at 215.

⁸ Majority at 7.

⁹ Fee Pet. Agreement at 1.

¹⁰ Exceptions Br. at 9.

¹¹ Majority at 7.

¹² 71 FLRA 211.

¹³ *Id.* at 211.

¹⁴ *Id.* at 217 (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Pollock, La.*, 70 FLRA 195, 196 (2017)).

¹⁵ Exceptions Br. at 9; *see also* CBA at 136.

¹⁶ I would likewise distinguish this case from our recent decision in *U.S. Dep’t of Air Force, Pope Air Force Base, N.C.*, 71 FLRA 338 (2019) (Member DuBester concurring). In that case, the agency failed to support its arguments with documentation or to make any argument that triggered contractual or BPA claims which would require the arbitrator to the address interest of justice standard.

¹⁷ *Local 1633*, 71 FLRA at 216.

¹⁸ *Id.*

- whether “incurred fees” can be considered “reasonable” at a rate which exceeds the attorney’s hourly/salaried rate when the attorney serves in-house.¹⁹

I do not agree that this step would necessarily require “another hearing”²⁰ insofar as the record already is quite complete. In any event, I do not believe that awarding fees that may not be warranted, when all factors are properly considered, promotes an effective and efficient government.

Accordingly, I dissent.

¹⁹ *Id.* at 219 (Separate Opinion of Member Abbott).

²⁰ Majority at 7 n.34.