68 FLRA No. 109

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 32
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
AUTOMATED COLLECTION SERVICE
DENVER, COLORADO
(Agency)

0-AR-4967
(67 FLRA 354 (2014))

_____

DECISION

June 15, 2015

_____

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

The Union filed an exception to Arbitrator Charles E. Krider's denial of the Union's request for reasonable attorney fees. We must decide whether the Arbitrator's denial of attorney fees is contrary to law. Because the Union has not demonstrated that the Agency's actions were clearly without merit or wholly unfounded, we deny this exception.

II. Background, Arbitrator's Awards, and Previous Authority Proceedings

The grievants, in the underlying case, normally work from 6:00 a.m. to 2:30 p.m. with a thirty-minute, unpaid lunch break. On one occasion, due to a snowstorm, the Agency allowed the grievants to arrive four hours later than usual but also gave four hours of administrative leave. On that day, the grievants worked from 10:00 a.m. to 2:30 p.m., a total of four-and-a-half hours. The Agency did not allow the employees to take their standard thirty-minute, unpaid lunch period that day, because the employees worked less than five hours. The grievants' timesheets, however, credited them with four hours of administrative leave and only four hours of work time. When the grievants sought to amend their timesheets to reflect the four-and-a-half hours worked, the Agency agreed to the change but then reduced the amount of administrative leave time to three-and-a-half hours so that the grievants would receive their regular eight hours of pay for that day. The Union filed a grievance, which was unresolved, and the parties submitted the matter to arbitration.

In his initial award, the Arbitrator agreed with the Union on the merits of the grievance and awarded the grievants four hours of administrative leave in addition to the four-and-a-half hours they actually worked. However, the Arbitrator denied the Union's request for attorney fees without any explanation. The Union filed exceptions to that award, arguing that the Arbitrator's summary denial of attorney fees was contrary to law. The Authority granted the Union's exceptions and remanded the issue of attorney fees back to the parties for resubmission to the Arbitrator, absent settlement.[1]

Upon remand, the Arbitrator found in his second award (the fees award) that the Agency's position was not clearly without merit, and therefore declined to award attorney fees under the Back Pay Act (BPA)[2] and 5 U.S.C. § 7701(g)(1).[3] The Arbitrator explained that, although he "clearly disagree[d]" with the Agency's position, the Agency did not advance a "frivolous or non-serious argument."[4] The Arbitrator further noted that "[t]here is surely no showing of bad faith on the part of the Agency."[5] Accordingly, the Arbitrator denied the Union's request for reasonable attorney fees.

The Union filed an exception to the Arbitrator's fee award.

III. Preliminary Matter: We will not consider the Agency's opposition.

On July 30, 2014, the Union filed its exception to the award. The Union's statement of service indicates that it served the exception on the Agency's representative of record by first class mail on July 30, 2014. As such, the Agency's opposition had to be filed with the Authority no later than September 3, 2014, in order to be timely.[6] However, the Agency's opposition was not received by the Authority's Office of Case Intake and Publication (CIP) until September 17, 2014.

On September 19, 2014, CIP issued an order directing the Agency to show cause why the Authority should consider its untimely opposition. The Agency did not file a response. Where a party does not respond to a

[1] *NTEU, Chapter 32*, 67 FLRA 354, 355 (2014).
[2] 5 U.S.C. § 5596.
[3] Fees Award at 10.
[4] *Id*.
[5] *Id*. at 11.
[6] *See* 5 C.F.R. § 2429.21(a).

show-cause order, the Authority has held that it will not consider the late filing that prompted the order.[7] Given the Agency's failure to respond to the order to show cause, we decline to consider its opposition to the Union's exceptions.

IV. Analysis and Conclusion: The Arbitrator's denial of attorney fees was not contrary to law.

The Union argues that the Arbitrator's denial of attorney fees was contrary to law. 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.[8] 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.[9] In making that assessment, the Authority defers to the arbitrator's underlying factual findings.[10]

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.[11] The BPA further requires that an award of attorney 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 the standards established under 5 U.S.C. § 7701(g), which pertains to attorney fee awards by the Merit Systems Protection Board (MSPB).[12] 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.[13] According to the Union, the Arbitrator erred in evaluating the "interest of justice" standard.[14] As such, we address only this requirement.[15]

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 v. USPS* (*Allen*).[16] In *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) 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; or (5) where the agency knew or should have known that it would not prevail on the merits when it brought the proceeding.[17]

The Union argues that attorney fees should be awarded under the second *Allen* criterion because the Agency's actions were "clearly without merit."[18] In determining whether fees are required under this criterion, the "competing interests to be examined are the degree of fault on the employee's part and the existence of any reasonable basis for the [a]gency's action."[19] This standard is met if it is plain that an agency's actions are based on incredible or unspecific evidence fully countered by the appellant, or if an agency presents little or no evidence to support its actions.[20]

The Union argues that the Arbitrator applied the wrong legal standard in evaluating whether the Union is entitled to attorney fees.[21] Specifically, the Union claims that the Arbitrator incorrectly evaluated the "interest of justice" standard as though it required evidence of bad faith, harassment, or frivolous arguments by the Agency.[22] According to the Union, the proper legal standard under the second *Allen* criterion is to "look at the result of the arbitration proceeding and the record evidence in order to weigh the merit of the Agency's actions against the degree of fault on the part of the

[7] *U.S. Dep't of VA, Wash., D.C.*, 67 FLRA 152, 153 (2013) (citing *U.S. Dep't of VA, Jefferson Barracks Nat'l Cemetery, St. Louis, Mo.*, 61 FLRA 861, 861 n.1 (2006)).
[8] *AFGE, Local 3506*, 65 FLRA 121, 123 (2010) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995); *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[9] *Id.* (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).
[10] *U.S. Dep't of the Navy, Commander, Navy Region Haw., Fed. Fire Dep't Naval Station, Honolulu, Haw.*, 64 FLRA 925, 928 (2010) (*Naval Station Honolulu*) (internal citation omitted).
[11] *Id.* (citing *U.S. DOD, Def. Distrib. Region E., New Cumberland, PA.*, 51 FLRA 155, 158 (1995) (*DOD New Cumberland*)).
[12] *Id.* (citing *DOD New Cumberland*, 51 FLRA at 158).
[13] *Id.* (citing *DOD New Cumberland*, 51 FLRA at 158).
[14] Exceptions Br. at 7-9.
[15] *See AFGE, Local 3294*, 66 FLRA 430, 431 (2012).
[16] 2 M.S.P.R. 420 (1980) (*Allen*); *see AFGE, Local 3294*, 66 FLRA at 430 n.3.
[17] *AFGE, Local 3294* at 430 n.3 (citing *Allen*, 2 M.S.P.R. at 434-35).
[18] Exceptions Br. at 8.
[19] *Naval Station Honolulu*, 64 FLRA at 929 (quoting *NAGE, Local R4-6*, 56 FLRA 1092, 1095 (2001)).
[20] *Id.* (citing *Ala. Ass'n of Civilian Technicians*, 56 FLRA 231, 234 (2000); *U.S. DOD, Def. Mapping Agency, Hydrographic/Topographic Ctr., Wash., D.C.*, 47 FLRA 1187, 1193-94 (1993)).
[21] Exceptions Br. at 4, 8.
[22] *Id.* at 4.

grievants."[23] The Union alleges that, under this standard, the Agency's actions must have been clearly without merit because the Arbitrator "wholly sustained the Union's grievance" in the initial award.[24]

However, the cases cited by the Union do not support the Union's claim that the Agency's actions are clearly without merit simply because the Agency did not prevail on the underlying grievance.[25] The Union offers no evidence or explanation as to why the Agency's actions were clearly without merit or wholly unfounded, outside of the fact that the Union prevailed. The Union presents nothing to rebut the Arbitrator's finding that "[t]he only fair reading of the evidence is that the Agency proceeded to arbitration with serious arguments and thought it had a chance to prevail."[26] As the Union has failed to rebut this finding, or otherwise demonstrate that the fee award is contrary to law, we deny this exception.

V. Decision

We deny the Union's exception.

[23] *Id.* at 8 (citing *Naval Station Honolulu*, 64 FLRA at 925; *U.S. Army Headquarters, XVIII Airborne Corps, Fort Bragg, N.C.*; 35 FLRA 390, 393-94 (1990) (*Fort Bragg*)).
[24] *Id.* at 9.
[25] *See Naval Station Honolulu*, 64 FLRA at 929; *Fort Bragg*, 35 FLRA at 395-96.
[26] Fees Award at 11.