74 FLRA No. 25

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
SEATTLE, WASHINGTON
(Agency)

and

NATIONAL TREASURY EMPLOYEES UNION
CHAPTER 139
(Union)

0-AR-5742

_____

DECISION

December 11, 2024

_____

Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko and Anne Wagner, Members
(Member Kiko concurring in part and dissenting in part)

I. Statement of the Case

In one award (the initial award), Arbitrator Robin A. Romeo awarded an employee (the grievant) backpay for a lost overtime opportunity. Then, in a later award (the fee award) – the award at issue here – the Arbitrator awarded the Union attorney fees. The Agency filed exceptions to the fee award on exceeded-authority and contrary-to-law grounds.

For the reasons discussed below, we partially grant and partially deny the exceptions, and we remand the case to the parties for resubmission to the Arbitrator, absent settlement, to reassess the amount of fees. In doing so, we reverse the Authority's decision in *AFGE, Local 1633* (*Local 1633*) to the extent it is inconsistent with this decision,[1] and return to pre-*Local 1633* precedent concerning when attorney fees are warranted in the interest of justice under 5 U.S.C. § 7701(g)(1).

II. Background

On November 28, 2018, the Agency placed the grievant on administrative duty due to a medical condition and temporarily revoked the grievant's authority to carry a firearm (firearm authorization). Although the parties' collective-bargaining agreement (CBA) requires the Agency to give an officer written notice explaining why it is revoking a firearm authorization, the Agency did not issue the requisite notice until February 5, 2019.

The Union filed a grievance alleging that the Agency violated the CBA by failing to issue the notice until February 5, 2019, and requested the "[i]mmediate return of weapon, [backpay] and interest for [lost] overtime . . . , [a] letter of apology . . . , attorney's fees, and any other remedy deemed appropriate."[2] The matter went to arbitration.

Before the arbitration hearing, the Agency notified the grievant that it would pay $1,756.29 in backpay for lost overtime opportunities that purportedly resulted from the Agency's failure to timely provide the notice. The Union objected to the Agency's calculations and the Agency's alleged attempt to settle the grievance.

Subsequently, the Agency filed a motion to dismiss the grievance, arguing it was moot because the Agency was *in the process of* granting the grievant the overtime pay that the grievance sought as a remedy.[3] The Arbitrator denied the motion, finding that the Agency was attempting to decide what the remedy would be and to provide it without the Union's agreement, and because there was still a clear dispute over how to calculate the lost overtime. The matter proceeded to hearing.

In the initial award, the Arbitrator framed the issue as "[w]hat is the appropriate amount of backpay with interest due the [g]rievant for his lost overtime caused by the Agency's violation of the [CBA]?"[4] The Arbitrator found that "the parties d[id] not dispute the [CBA] was violated and [that] an unwarranted or unjustified personnel action occurred."[5] Rather, the Arbitrator found that the only issue was the appropriate remedy for the violation. As to that issue, the Union argued that the Agency owed the grievant $4,813.24 for twelve lost overtime opportunities. However, the Arbitrator found that the grievant's placement on administrative duty from November 28, 2018, to February 5, 2019, limited the

[1] 71 FLRA 211, 215 (2019) (Member Abbott concurring; Member DuBester concurring in part, dissenting in part).
[2] Fee Award at 2 (internal quotation marks omitted).
[3] We note that neither the initial award nor the fee award states whether the Agency actually paid the grievant. However, the Agency concedes in its exceptions that it did not actually pay the grievant $1,756.29 "prior to the [issuance of the initial] . . . [a]ward." Exceptions Br. at 20-21 n.132.
[4] Initial Award at 2.
[5] *Id.* at 13.

grievant's overtime opportunities. Thus, the Arbitrator determined that the Agency's CBA violation caused the grievant to lose the ability to earn overtime pay for only one hour of administrative duty. As such, the Arbitrator awarded $93.48 in backpay and interest. The Arbitrator also directed the Agency to pay the Union reasonable attorney fees.

Subsequently, the Agency submitted, to the Arbitrator, a motion for reconsideration of the Arbitrator's attorney-fee determination. After the parties conferred, the Union submitted a petition for attorney fees and expenses in the amount of $30,283.75, and the Agency submitted an opposition.

In a fee award, the Arbitrator considered whether fees were warranted under 5 U.S.C. § 7701(g). The Arbitrator first found that the grievant was the prevailing party because (1) the Agency agreed during the grievance process that it violated the CBA, and (2) the grievant prevailed *in the initial award* when the Arbitrator determined that the Agency owed the grievant one hour of overtime pay for the CBA violation – *not beforehand* when the Agency unilaterally decided to pay the grievant a certain sum. In so finding, the Arbitrator rejected the Agency's claim that the grievant was not the prevailing party because the initial award "reduced the Agency's monetary obligation."[6] Rather, the Arbitrator determined that the amount of money the Agency offered and the amount the Arbitrator awarded were irrelevant. The Arbitrator also distinguished *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources* (*Buckhannon*)[7] on the ground that, in the instant case, "[t]he Agency's unilateral [agreement to pay] during the grievance process was not a voluntary action which achieved the [g]rievant's desired result," because the Agency did not award the amount that the Union sought as overtime, did not award the other requested remedies, and did not rescind the personnel action.[8]

The Arbitrator next considered the factors that the Merit Systems Protection Board (MSPB) identified in *Allen v. U.S. Postal Service* (*Allen*)[9] to determine whether fees were warranted in the interest of justice. As relevant here, the Arbitrator found that "[t]he Agency's violation of failing to issue the letter was done without any rational[e] or basis" and was thus clearly without merit.[10] Further, the Arbitrator found that the Agency prolonged the grievance process by filing a meritless motion to dismiss. The Arbitrator also found that because the argument in the Agency's motion was rejected, the Agency's same argument in subsequent briefs was "clearly without merit."[11]

Finally, the Arbitrator concluded that the Union's requested amount of attorney fees was reasonable. The Arbitrator found that: the Union articulated the time its attorneys spent performing legal work and demonstrated their bar admissions and the ascribed hourly fees and rate associated with each of them; the activities described were compensable; and "[t]he hours and the dollar figure [were] both reasonable."[12] Further, the Arbitrator found that "[t]here's no authority for the Agency's proposition that the amount of fee should reflect the amount of money reflected by the remedy awarded by the arbitrator."[13] Accordingly, the Arbitrator granted the Union's petition and ordered the Agency to pay the Union $30,283.75.

The Agency filed exceptions to the fee award on July 12, 2021, and the Union filed an opposition to the Agency's exceptions on August 11, 2021.

III. Analysis and Conclusions

A. The fee award is deficient, in part.

The Agency argues that the fee award is contrary to the Back Pay Act (BPA) and 5 U.S.C. § 7701(g)(1) for numerous reasons. The Authority reviews questions of law raised by the exceptions de novo.[14] In applying a standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law, based on the underlying factual findings.[15] In conducting that assessment, the Authority defers to the arbitrator's factual findings unless the excepting party establishes they are based on nonfacts.[16]

Under the BPA, the threshold requirement for an attorney-fee award is a finding by an appropriate

[6] Fee Award at 10.
[7] 532 U.S. 598 (2001).
[8] Fee Award at 11 (internal quotation marks omitted).
[9] 2 M.S.P.R. 420 (1980). The *Allen* factors are set forth below.
[10] Fee Award at 12.
[11] *Id.* at 12-13. The Arbitrator also found that fees were in the interest of justice on the grounds that the Agency: (1) committed a prohibited personnel practice, *id.* at 12; (2) committed a gross procedural error, *id.*; and (3) knew or should have known it would not prevail on the merits, *id.* at 12-13.
[12] *Id.* at 14.
[13] *Id.*
[14] *U.S. DOL, Off. of Workers' Comp.*, 72 FLRA 489, 490 (2021) (*Workers' Comp.*) (Member Abbott concurring) (citing *NFFE, Loc. 1953*, 72 FLRA 306, 306 (2021)).
[15] *Id.*
[16] *Id.* (citing *AFGE, Loc. 2002*, 70 FLRA 812, 814 (2018)).

authority[17] that the employee was affected by an unjustified or unwarranted personnel action, which resulted in a withdrawal or reduction of the employee's pay, allowances, or differentials.[18] In addition, the BPA requires that an attorney-fee award be in accordance with the standards established under 5 U.S.C. § 7701(g)(1).[19] Those standards require that: (1) the employee is the prevailing party; (2) the award of fees is warranted in the interest of justice; (3) the amount of the fees is reasonable; and (4) the employee has incurred the fees.[20]

When resolving an attorney-fee request under the BPA, arbitrators must set forth specific findings supporting their determinations on each pertinent statutory requirement.[21] When an arbitrator does not do so, the Authority will examine the record to determine whether it permits the Authority to resolve the matter.[22] If the record does, then the Authority will modify the award or deny the exception as appropriate.[23] If the record does not, then the Authority will remand the award for further proceedings.[24]

1. The fee award is in conjunction with an award of pay, allowances, or differentials.

The Agency argues the fee award is contrary to the BPA because it was not in conjunction with an award of pay, allowances, or differentials.[25] Specifically, the Agency argues the Arbitrator expressly referred to the initial award as "a monetary award, not the payment of overtime pay," and as "compensation" and not "overtime pay."[26] As a result, the Agency contends, the award of backpay "amounts to nothing more than money damages, which [are] not authorized under the [BPA]."[27]

In the fee award, the Arbitrator cited a similar case between the parties and stated that, *in that case*, "the arbitrator found the award to be a 'monetary award,' not the payment of 'overtime' pay."[28] The Arbitrator also stated elsewhere in the fee award that the initial award "ordered the [g]rievant to be compensated."[29]

However, the initial award specifically addressed "[w]hat is the appropriate amount of [*backpay*] with interest due the [g]rievant for . . . lost overtime," and the Arbitrator specifically awarded the grievant "overtime pay plus interest."[30] In the fee award, the Arbitrator stated that the initial award found that the grievant was "owed [backpay]" for the CBA violation.[31] There is no basis for the Agency's argument that the Arbitrator's other comments render the award of backpay "nothing more than money damages."[32] As such, we deny this exception.[33]

2. The Agency has failed to establish that the grievant was not the prevailing party.

The Agency argues that the award is contrary to law because the grievant was not the prevailing party within the meaning of 5 U.S.C. § 7701(g)(1).[34] The Authority applies the definition of "prevailing party" that is set forth in *Buckhannon*[35] and that the MSPB adopted under § 7701(g).[36] Under that definition, a grievant is a prevailing party when the grievant obtains an enforceable judgment that benefited the grievant at the time of the judgment.[37] "[O]nly enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees under federal

[17] *See* 5 C.F.R. § 550.803 ("Appropriate authority means an entity having authority in the case at hand to correct or direct the correction of an unjustified or unwarranted personnel action, including . . . (i) an arbitrator in a binding arbitration case, and (j) the head of the employing agency or another official of the employing agency to whom such authority is delegated.").
[18] 5 U.S.C. § 5596(b)(1).
[19] *Id.* § 5596(b)(1)(A)(ii); *see also U.S. Dep't of the Treasury, IRS*, 71 FLRA 400, 403 (2019) (Member Abbott dissenting as to other matters).
[20] 5 U.S.C. § 7701(g)(1). The Agency does not dispute that the fourth factor is met here. Therefore, we do not discuss that factor further.
[21] *AFGE, Loc. 2583*, 69 FLRA 538, 539 (2016) (*Local 2583*) (citing *U.S. DHS, U.S. CBP*, 66 FLRA 335, 341 (2011) (*CBP*), *recons. denied*, 66 FLRA 634 (2012)).
[22] *Id.* (citing *NAGE, SEIU, Loc. 551*, 68 FLRA 285, 289 (2015)).
[23] *Id.*
[24] *Id.* (citing *USDA, Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 53 FLRA 1688, 1694 (1998)).
[25] Exceptions Br. at 8.
[26] *Id.* at 10, 13.
[27] *Id.* at 13.
[28] Fee Award at 10.
[29] *Id.* at 13.
[30] *Id.* at 9 (internal quotation marks omitted) (emphasis added).
[31] *Id.* at 10. We note that the Arbitrator does not use the phrase "money damages" anywhere in the initial award or fee award.
[32] Exceptions Br. at 13.
[33] The Agency also argues that the Arbitrator erred by awarding money damages because that was not a remedy submitted to arbitration. Exceptions Br. at 47. As the Arbitrator did not award money damages, we reject that argument. *See AFGE, Loc. 3911*, 69 FLRA 233, 237 (2016) (denying an exceeded-authority claim based on a faulty premise rejected in a contrary-to-law exception).
[34] Exceptions Br. at 23-28.
[35] 532 U.S. 598.
[36] *AFGE, Loc. 2145*, 68 FLRA 120, 122 (2014) (citing *AFGE, Loc. 446*, 64 FLRA 15, 15-16 (2009) (*Local 446*)).
[37] *Id.* (citing *AFGE, Loc. 987*, 64 FLRA 884, 887 (2010)).

fee[-]shifting statutes."[38] Further, the degree of success obtained is not a consideration in determining whether an employee is a prevailing party.[39]

The Agency argues the Arbitrator's prevailing-party finding is contrary to *Buckhannon* and related Authority precedent.[40] According to the Agency, the grievant did not prevail, because the grievant "clearly did not achieve a benefit from arbitration."[41] Specifically, the Agency argues that: *the Agency* created a "monetary obligation" to the grievant when it determined, *before arbitration*, that it owed the grievant backpay; and "the Arbitrator's make-whole relief of $93.48 (plus interest) was significantly less" than the $1,756.29 that the Agency had calculated it owed.[42] In addition, the Agency notes that, in finding the grievant was a prevailing party, the Arbitrator stated that the difference between the amount the Arbitrator awarded the grievant and the amount the Agency "granted" the grievant was "irrelevant."[43] According to the Agency, those statements conflict with the BPA because the difference in amounts "clearly establishes" that the grievant did not prevail at arbitration.[44] Relatedly, the Agency notes that the Arbitrator found that "[t]he Agency's [notification that it would pay the grievant] during the grievance process was not a voluntary action [that] achieved the [g]rievant's desired result," because the Agency did not award the *other* remedies that the grievance requested.[45] According to the Agency, the Arbitrator should not have considered those other requested remedies because they did not apply to the issue before the Arbitrator.[46]

The Agency's arguments lack merit. The initial award specifically found that the Agency violated the CBA and directed the Agency to pay the grievant "overtime pay plus interest in the amount of one-hour."[47] Therefore, the grievant obtained an enforceable judgment that benefited the grievant, and achieved some of the benefit that the grievance sought: overtime pay.[48] Although the Agency relies on its notification that it would pay the grievant $1,756.29, the Agency concedes that it did not make the payment before the Arbitrator issued the initial award.[49] Further, the Arbitrator found that the Union disputed the Agency's calculation of overtime pay and that the parties did not enter into a settlement agreement – and the Agency does not challenge those findings as nonfacts.[50] Moreover, the Arbitrator determined that "[t]he Agency's monetary obligation was defined in the [initial] award" and not

[38] *AFGE, Loc. 1547*, 58 FLRA 241, 242 (2002) (*Local 1547*) (citing *Buckhannon*, 532 U.S. at 604).
[39] *IFPTE, Loc. 529*, 57 FLRA 784, 786 (2002) (*Local 529*) (citing *Farrar v. Hobby*, 506 U.S. 103, 113-14 (1992) (*Farrar*); *AFGE, Loc. 3310*, 53 FLRA 1595, 1600 (1998)).
[40] Exceptions Br. at 23 (citing *Local 1547*, 58 FLRA at 242 (citing *Buckhannon*, 532 U.S. at 605-06)).
[41] *Id.* at 14.
[42] *Id.* at 16, 17.
[43] *Id.* at 18.
[44] *Id.*
[45] Fee Award at 11 (internal quotation omitted).
[46] Exceptions Br. at 25-28.
[47] Fee Award at 2.
[48] *See id.* at 2 (reciting the relief requested in the grievance); *see also* Exceptions, Attach. 8.4, Grievance Form at 2.
[49] Exceptions Br. at 20-21 n.132.
[50] Fee Award at 12 ("[T]he Agency paid [the grievant] a sum of money, without entering into a settlement agreement, in an amount disputed by the Union."). In fact, regarding when the Agency notified the grievant that it would be paying him $1,756.29 in back pay for lost overtime, the Agency explains in its brief that:

> Upon receiving notification [of the Agency's notification to the grievant] . . . the Union alleged the Agency was seeking to unilaterally settle the matter with [the g]rievant. The Agency responded that it was not seeking to settle the matter. To this end, the Agency explicitly informed the Union: "[I]n no way was the [Agency] trying to settle with [the grievant]. That absolutely was not the case. The only thing the [Agency] provided to [the grievant], was a payment notice. This was not a situation where your client was asked to withdraw his grievance, or anything of that nature. His rights for this grievance/hearing are still in full effect." Understanding that [the g]rievant's rights were still in force, the Union pursued litigation, as it believed the back pay/lost overtime award was insufficient to fully address [the g]rievant's alleged lost overtime.

Exceptions Br. at 4-5.

unilaterally beforehand.[51] The Agency's concession and the Arbitrator's findings support a conclusion that the grievant was the prevailing party.[52] Thus, the Arbitrator's conclusion that the grievant was the prevailing party is consistent with *Buckhannon* and related precedent, and we deny this exception.[53]

3. The Agency has failed to establish that attorney fees are not warranted in the interest of justice.

The Agency argues that the Arbitrator's interest-of-justice findings are contrary to law.[54] As noted above, 5 U.S.C. § 7701(g)(1) requires that an attorney-fee award be "warranted in the interest of justice."[55] In conducting that assessment, for over three decades, the Authority relied on the factors that the MSPB identified in *Allen*.[56] Under *Allen*, an attorney-fee award is warranted in the interest of justice if: (1) the agency engaged in a prohibited personnel practice; (2) the agency's action was clearly without merit, or was wholly unfounded, or the employee is substantially innocent of the charges brought by the agency; (3) the agency initiated the action against the employee in bad faith; (4) the agency committed a 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.[57] These factors are "not exhaustive, but illustrative."[58]

[51] Fee Award at 10. To the extent the Agency argues that the Arbitrator's finding that the "Agency's monetary obligation was defined in the [initial] award" and not unilaterally beforehand is contrary to law, *see* Exceptions Br. at 18, we reject that argument because it challenges the Arbitrator's evaluation of the evidence. *See AFGE, Loc. 2302*, 70 FLRA 202, 204 (2017) (citing *U.S. DOL*, 70 FLRA 27, 30 (2016)) (denying a contrary-to-law exception because "arguments that challenge an arbitrator's evaluation of evidence and determinations of the weight to be accorded such evidence do not establish that an award is contrary to law"). Relatedly, the Agency filed an exceeded-authority exception to the Arbitrator's "disapprov[al] of the Agency's unilateral and voluntary action of awarding a [backpay]/lost[-]overtime remedy prior to [a]rbitration." Exceptions Br. at 48. We deny this exception because it fails to explain how the Arbitrator failed to resolve an issue submitted to arbitration, resolved an issue not submitted to arbitration, disregarded specific limitations on the Arbitrator's authority, or awarded relief to those not encompassed within the grievance. *See AFGE, Loc. 1367*, 67 FLRA 378, 379 (2014).

[52] *See Local 529*, 57 FLRA at 786; *see also U.S. DOD, DOD Dependents Schs.*, 54 FLRA 773, 789 (1998) (holding that the fact that the grievant's recovery was arguably nominal was irrelevant to the prevailing party determination).

[53] The decisions that the Agency cites on this point are distinguishable. In *Local 446*, the agency voluntarily and unilaterally rescinded a suspension and agreed to award backpay *during the arbitration hearing*, and *submitted proof of such to the arbitrator*. 64 FLRA at 15. The Authority held that the arbitrator correctly concluded that the grievant was not the prevailing party for attorney-fee purposes because *the grievant did not obtain an enforceable arbitration award*, consent decree, or settlement agreement. *Id.* at 16. Such is not the case here. In *U.S Department of State*, the agency rescinded a suspension before the arbitration hearing, and *both parties agreed that the grievant did not lose pay* as a result of the suspension. 59 FLRA 129, 129-130 (2003). The Authority concluded that an attorney-fee award was contrary to the BPA because "an appellant is not the 'prevailing party' where an agency unilaterally rescinds an adverse action during the pendency of an appeal." *Id.* at 130; *see also Local 1547*, 58 FLRA at 243 (citing *Sacco v. DOJ*, 90 M.S.P.R. 37, 41-42 (2001)) (finding that "a unilateral agency rescission does not result in a consent decree, judgment, order, or settlement agreement by which [an appellate board] can enforce any relief"). In this case, there is no dispute that the grievant lost some pay, and the grievant obtained an enforceable arbitration award. The Authority's decision in *Local 1547* is distinguishable for similar reasons as the previous two cases. Finally, the Agency also filed an exceeded-authority exception alleging that the Arbitrator "wrongfully distinguished this matter from *Buckhannon*" and Authority precedent for the same reasons alleged above. Exceptions Br. at 47-48. Because we have rejected the Agency's contrary-to-law claim on this point, we also reject the Agency's exceeded-authority argument. *See U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Lexington, Ky.*, 68 FLRA 932, 943 (2015) (Member Pizzella concurring in part and dissenting in part) (denying an exceeded-authority exception premised on a rejected contrary-to-law claim).

[54] Exceptions Br. at 31-44.

[55] 5 U.S.C. § 7701(g)(1).

[56] 2 M.S.P.R. 420. *See, e.g.*, *Local 2583*, 69 FLRA at 539-40 (stating Authority analyzes whether attorney fees are warranted in the interest of justice by considering the five *Allen* factors); *NTEU, Chapter 32*, 68 FLRA 690, 691 (2015) (*Chapter 32*) (same); *CBP*, 66 FLRA at 341 (same); *AFGE, Council 220*, 61 FLRA 582, 585 (2006) (*Council 220*) (same); *U.S. DOD, Def. Fin. & Acct. Serv.*, 60 FLRA 281, 284 (2004) (Member Pope dissenting on other grounds) (same); *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr., Newport, R.I.*, 57 FLRA 32, 34 (2001) (same); *Laborers' Int'l Union of N. Am., Loc. 1376*, 54 FLRA 700, 702-03 (1998) (same); *U.S. Dep't of the Treasury, IRS, Austin Compliance Ctr., Austin, Tex.*, 48 FLRA 1281, 1292 (1994) (*IRS Austin*) (same); *U.S. Dep't of the Army, Red River Army Depot, Texarkana, Tex.*, 39 FLRA 1215, 1222-23 (1991) (*Red River*) (same); *Naval Air Dev. Ctr., Dep't of the Navy*, 21 FLRA 131, 137 (1986) (*Naval Air*) (same). The Authority also has held that an award of attorney fees is warranted in the interest of justice whether there is a service to the federal workforce or a benefit to the public derived from maintaining the action. *See, e.g.*, *NTEU*, 69 FLRA 614, 618 (2016) (*NTEU*) (citing *Naval Air*, 21 FLRA at 139).

[57] *AFGE, Loc. 3197*, 73 FLRA 425, 425 n.2 (*Local 3197*) (citing *Allen*, 2 M.S.P.R. at 434-45), *recons. denied*, 73 FLRA 477 (2023).

[58] *Allen*, 2 M.S.P.R. at 435.

The Authority has stated that, "when a matter does not involve a disciplinary action, . . . the 'substantially innocent' analysis [under the second *Allen* factor] is not applicable."[59] However, with that lone exception, the Authority did not – prior to *Local 1633* – limit the application of the *Allen* factors in cases where the grieved action is not disciplinary in nature (non-disciplinary cases).

Then, in *Local 1633*, the Authority held that, in non-disciplinary cases, "the 'interest of justice' analysis *should* focus on" two of the *Allen* factors: specifically, the "clearly without merit and wholly unfounded" component of the second *Allen* factor (*Allen* 2),[60] and the fifth *Allen* factor (*Allen* 5).[61] The Authority has subsequently reiterated that point.[62] Although the Authority did not entirely foreclose the application of other *Allen* factors in non-disciplinary cases,[63] it strongly implied that arbitrators and parties should focus on *Allen* 2 and 5 in such cases.

On reexamination, we believe that was unnecessarily restrictive and misleading. With regard to the first *Allen* factor (*Allen* 1) – whether the agency engaged in a prohibited personnel practice – it is not uncommon for the Authority to resolve arbitration appeals involving non-disciplinary actions that are alleged to constitute prohibited personnel practices.[64] As such, we question *Local 1633*'s citation to prohibited-personnel-practice cases to support its claim that "[t]here may be *exceptional* circumstances in which" factors other than *Allen* 2 and 5 are relevant.[65] As for the third and fourth *Allen* factors (*Allen* 3 and 4) – respectively, whether the agency initiated the action against the employee in bad faith, or the agency committed a gross procedural error which prolonged the proceeding or severely prejudiced the employee – neither the Authority nor the MSPB has limited the application of those factors to disciplinary cases.[66]

While *Allen* 2 and 5 may often be more relevant than the other *Allen* factors in assessing the interest-of-justice standard in non-disciplinary cases, we should not assume or prejudge that such will be true in every non-disciplinary arbitration case the Authority hears. *Local 1633* created a misimpression that arbitrators and parties should not look to the other *Allen* factors, even in cases where those factors are appropriately applied – or even where they are *more* appropriately applied than *Allen* 2 and 5. For these reasons, we overrule *Local 1633* and any related precedent to the extent they hold or imply that only *Allen* 2 and 5 may apply in non-disciplinary cases.

Local 1633 also modified how *Allen* 2 and 5 apply in non-disciplinary cases, citing MSPB "cases in which an applicant for retirement benefits successfully appeals an unfavorable reconsideration decision by the Office of Personnel Management (OPM)."[67] Before *Local 1633*, the Authority assessed *Allen* 2 – whether the agency's action was clearly without merit or wholly unfounded – by considering the "competing interests" of the "degree of fault on the employee's part and the existence of any reasonable basis for the [a]gency's action."[68] The Authority stated, "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."[69] The Authority applied this standard in both

[59] *NAIL, Loc. 5*, 69 FLRA 573, 576 (2016) (*Local 5*).

[60] As the "substantially innocent" aspect of the second *Allen* factor does not apply in non-disciplinary cases, throughout this decision, we use the term "*Allen* 2" to refer to the "clearly without merit and wholly unfounded" component of the second *Allen* factor.

[61] *Local 1633*, 71 FLRA at 211.

[62] *AFGE, Loc. 2145*, 71 FLRA 346, 348 (2019) (Member DuBester concurring) (stating that, "[o]n remand, as the [a]rbitrator considers the [u]nion's petition for attorney fees, he should follow the guidelines we established in our recent decision in" *Local 1633*).

[63] *Local 1633*, 71 FLRA at 217 (acknowledging that "[t]here may be exceptional circumstances in which other considerations are relevant").

[64] *See, e.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Ashland, Ky.*, 74 FLRA 13, 13 (2024) (grievance alleged, among other things, a prohibited personnel practice, specifically, reassigning the grievant and denying him overtime in retaliation for making protected disclosures); *U.S. Dep't of the Army, U.S. Army Garrison, Directorate of Emergency Servs., Fort Huachuca, Ariz.*, 73 FLRA 919, 919 (2024) (arbitrator found prohibited personnel practice, specifically, reassigning employees in retaliation for the union filing a grievance).

[65] *Local 1633*, 71 FLRA at 217 & n.61 (emphasis added).

[66] *See, e.g., Local 5*, 69 FLRA at 576-77 (applying *Allen* 4 in non-disciplinary case where agency violated CBA by failing to timely place grievant on an overtime roster and provide him with access to an agency computer system needed to perform overtime work, but denying union exceptions to arbitrator's finding that the *Allen* 4 factor was not met); *Council 220*, 61 FLRA at 585-86 (applying *Allen* 3 and 4 in non-disciplinary case where agency violated CBA by failing to grant grievants priority consideration for selections, but denying union exceptions to arbitrator's findings that the *Allen* 3 and 4 factors were not met); *McKenna v. Dep't of the Navy*, 108 M.S.P.R. 404, 409-11 (2008) (*McKenna*) (applying *Allen* 4 in non-disciplinary case involving failure to afford appellant proper assignment rights in a reduction in force (RIF)).

[67] 71 FLRA at 216 (noting that the "modified guidelines" would apply "when the grievance centers around a question of the interpretation of the parties' [CBA]").

[68] *NTEU*, 69 FLRA at 618 (alteration in original).

[69] *Id.*; *see also Local 5*, 69 FLRA at 575; *Chapter 32*, 68 FLRA at 691.

disciplinary cases[70] and non-disciplinary cases,[71] with little or no difficulty.

Then, in *Local 1633*, with regard to *Allen* 2, the Authority stated:

> The "clearly without merit" standard focuses on the result of the arbitration, and may be satisfied if, at some point prior to the close of the record before the arbitrator, the agency's failure to reverse its position was blameworthy. In applying that standard, the arbitrator should consider the totality of the circumstances. Relevant considerations include the extent to which the grievant produced evidence that was so compelling that reasonable minds could not disagree that the grieved action was unwarranted or unjustified and, if such compelling evidence was introduced, the extent to which the agency's intransigence needlessly prolonged the arbitration process.[72]

As for *Allen* 5 – whether the agency knew or should have known it would not prevail on the merits[73] – before *Local 1633*, the Authority held that this factor "requires evaluation of the nature and weight of the agency's evidence,"[74] and "essentially requires an arbitrator to determine the reasonableness of an agency's actions and positions in light of what information was available to it at the time it makes its decision to take the personnel action involved."[75] For example, the Authority found *Allen* 5 satisfied where "information was exclusively within the possession and control of the [a]gency," and a "reasonable inquiry" by the agency should have led it to determine it would not prevail at arbitration.[76] The Authority found the *Allen* 5 "assessment is primarily factual, because the arbitrator evaluates the evidence and the agency's handling of the evidence."[77] Like *Allen* 2, the Authority applied *Allen* 5 in both disciplinary cases[78] and non-disciplinary cases,[79] with little or no difficulty.

In *Local 1633*, disregarding this longstanding precedent, the Authority stated as to *Allen 5*:

> The "knew or should have known" standard requires an evaluation of the evidence that was available to the agency at the time it denied the grievance. Attorney fees may be warranted under that criterion if it is found that the agency was negligent in taking the grieved action, that it lacked a reasonable and supportable explanation for its position, or that it ignored clear, unrebutted evidence that the grieved

[70] *See, e.g.*, *AFGE, Loc. 446*, 71 FLRA 1020, 1020-21 (2020) (Member DuBester concurring); *AFGE, Loc. 1482*, 70 FLRA 214, 214-15 (2017) (*Local 1482*).

[71] *See, e.g.*, *NTEU*, 69 FLRA at 618-19 (work-schedule disputes); *Local 5*, 69 FLRA at 575-77 (overtime dispute); *Chapter 32*, 68 FLRA at 691-92 (administrative-leave denial); *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div., Indian Head, Md.*, 57 FLRA 417, 423 (2001) (denial of a within-grade increase); *Ala. Ass'n of Civilian Technicians*, 56 FLRA 231, 234 (2000) (*Ala. ACT*) (Member Wasserman dissenting in part on other grounds) (temporary-promotion denial); *U.S. Dep't of VA, Med. Ctr., N. Chi., Ill.*, 52 FLRA 387, 398 (1996) (denial of cash performance awards); *U.S. Dep't of the Navy, Mare Island Naval Shipyard, Vallejo, Cal.*, 49 FLRA 820, 823 (1994) (dispute regarding separation of employees in RIF); *IRS Austin*, 48 FLRA at 1292-93 (unfair-labor-practice (ULP) case involving failure to comply with arbitration award); *U.S. Dep't of HHS, SSA*, 48 FLRA 1040, 1050-51 (1993) (case of an agency's unwarranted filing of exceptions to a prior arbitration award); *U.S. Customs Serv.*, 46 FLRA 1080, 1091-92 (1992) (ULP case involving failure to comply with a clarified arbitration award); *Overseas Educ. Ass'n*, 44 FLRA 1301, 1303-04 (1992) (*Overseas*) (dispute involving travel and transportation expenses); *Red River*, 39 FLRA at 1222-23 (dispute involving denial of cash performance award); *Dep't of the Air Force Headquarters, 832d Combat Support Grp. DCPE, Luke Air Force Base, Ariz.*, 32 FLRA 1084, 1097-98 (1988) (ULP case involving failure to comply with an arbitration award).

[72] 71 FLRA at 217.

[73] *Local 3197*, 73 FLRA at 425 n.2 (citing *Allen*, 2 M.S.P.R. at 434-45).

[74] *Council 220*, 61 FLRA at 586.

[75] *Id.*

[76] *Dep't of HHS, Pub. Health Serv., Region IV, Atlanta, Ga.*, 34 FLRA 823, 831-32 (1990).

[77] *Council 220*, 61 FLRA at 586; *see also Local 5*, 69 FLRA at 577.

[78] *Local 1482*, 70 FLRA at 214-15; *U.S. DHS, U.S. CBP*, 70 FLRA 73, 76 (2016).

[79] *See, e.g.*, *NTEU*, 69 FLRA at 618-19 (work-schedule disputes); *Local 5*, 69 FLRA at 577 (overtime dispute); *CBP*, 66 FLRA at 341 (employee reassignments); *Council 220*, 61 FLRA at 586 (failure to give priority consideration); *NTEU, Chapter 50*, 54 FLRA 250, 254 (1998) (temporary-promotion dispute); *Overseas*, 44 FLRA at 1303-04 (dispute involving travel and transportation expenses); *Red River*, 39 FLRA at 1222-23 (dispute involving denial of cash performance award).

> action was contrary to law, regulation, or negotiated agreement provisions.[80]

The Authority further "observe[d]" that, in many non-disciplinary cases,

> the dispute arises not because the agency acted in disregard of the facts or its legal obligations, but rather because the parties disagree in good faith over the most reasonable interpretation of a CBA provision or a statutory or regulatory requirement. In such circumstances, it can seldom be said that the agency knew or should have known at the time it denied the grievance that it would not prevail on the merits at arbitration. . . . Even in cases where the grievant prevails based on compelling evidence introduced during arbitration, a fee award will be warranted under the clearly without merit standard only to the extent the agency took actions that caused the grievant to incur additional fees after the dispositive evidence was introduced. Ordinarily, an agency does not needlessly prolong the proceeding merely by awaiting the arbitrator's decision.[81]

The Authority summarized that, in non-disciplinary cases,

> the "interest of justice" analysis should focus on whether (a) the agency "knew or should have known," at the time that it denied the grievance, that it would not prevail at arbitration; or (b) prior to the close of the record at arbitration, compelling evidence that the agency's position was "clearly without merit" made the agency's prolonging of the proceedings blameworthy.[82]

In deciding to adapt OPM-retirement precedent to the arbitration context, the Authority did not rely on MSPB precedent that has applied the traditional *Allen* factors in a wide range of non-disciplinary cases.[83] Rather, the Authority justified its decision to apply OPM-retirement precedent as follows: "The [MSPB] has itself recognized that the *Allen* guidelines were developed in the adverse[-]action context, and require modification for use in other types of cases in which attorney fees may be awarded under § 7701(g)(1). *Most helpfully for our purposes*, these include cases" involving OPM-retirement decisions.[84]

However, the Authority did not explain why OPM-retirement decisions are "[m]ost helpful[]" in this context.[85] Further, when the MSPB adopted a modified *Allen* test in the OPM-retirement context, it relied on considerations specific to that context.[86] The MSPB gave no indication that these modifications were intended to apply to cases that did not involve disability-retirement

[80] *Local 1633*, 71 FLRA at 217.
[81] *Id.*
[82] *Id.* at 211.
[83] *See, e.g.*, *McKenna*, 108 M.S.P.R. at 409-11 (case involving RIF); *see also Wong v. Dep't of Agric.*, No. SF-0752-17-0382-A-1, 2024 WL 3936011, at *2-3 (MSPB Aug. 23, 2024) (performance-based actions); *Williams v. DOD*, No. CH-0752-11-0075-A-1, 2013 WL 9659041, at *4-5 (MSPB Nov. 25, 2013) (involving indefinite suspensions due to denial of eligibility to hold a sensitive position, unrelated to discipline); *Messenger v. DOL*, No. DC-352C-080748-A-1, 2011 WL 12505354, at *2 (MSPB Aug. 23, 2011) (involving denial of reemployment requests and violations of rights to retain insurance coverage). *Cf. Briseno v. Dep't of VA*, No. SF-0752-13-0014-A-1, 2014 WL 6535674, at *3 (MSPB Nov. 20, 2014) (applying *Allen* in case involving noncompliance with settlement agreement related to removal).
[84] *Local 1633*, 71 FLRA at 216 (emphasis added).
[85] *Id.*
[86] *See Kent v. OPM*, 33 M.S.P.R. 361, 368 (1987) (*Kent*) (finding that the considerations that apply in adverse-action cases "do not seem to us to be directly applicable to determining whether OPM's reconsideration decision in a disability[-]retirement case is 'clearly without merit'"; that "OPM's 'action' consists largely of evaluating the evidence submitted by the appellant, rather than evaluating evidence that the agency itself was responsible for developing"; and that "[w]e cannot equate the additional litigation facing an appellant who simply fails to marshal[] sufficient evidence before OPM with the burden imposed on an innocent employee wrongfully accused of misconduct or unacceptable performance."); *id.* at 368 n.5 ("Litigating an entitlement to a disability retirement annuity, unlike litigating an adverse[-]action case, generally is an all-or-nothing proposition, with no middle ground such as mitigation. Thus, a determination by the [MSPB] that an appellant is entitled to retirement benefits demonstrates only that he has met his burden of proof and prevailed."); *Simmons v. OPM*, 31 M.S.P.R. 559, 566 (1986) (*Simmons*) (finding that *Allen* 5 "must be modified to th[e] extent" that, in the disability-retirement context, "it is the appellant, rather than the agency, who initiates the proceedings and who submits most of the record evidence in an employee-initiated application for disability retirement").

appeals – let alone that they should apply in all non-disciplinary cases.[87]

Further, as stated above, the Authority repeatedly has applied the MSPB's well-established "clearly without merit and wholly unfounded" and "knew or should have known" *Allen* standards in the non-disciplinary context, with little or no difficulty. Both the MSPB's and the Authority's longstanding applications of *Allen* 2 and 5 have created a rich body of precedent that the Authority may draw from in deciding attorney-fee cases involving those factors.[88]

For these reasons, we believe that, in *Local 1633*, the Authority erred in modifying how *Allen* 2 and 5 apply in non-disciplinary cases. Therefore, we overrule *Local 1633*, and any precedent applying it, to the extent those decisions modify how *Allen* 2 and 5 may apply in non-disciplinary cases.[89]

Our colleague criticizes us for reconsidering *Local 1633* without a party asking us to do so.[90] However, the Agency argues the Arbitrator misapplied the *Local 1633* standards,[91] and relies solely on those standards to argue the Arbitrator's "clearly without merit" and "knew or should have known" conclusions are contrary to law.[92] We believe that, in the course of resolving those exceptions, it is wholly appropriate to reassess the *Local 1633* standards.

In addition, our colleague contends that, by overturning *Local 1633*, we "signal[] that arbitrators should expend time and effort considering each of the *Allen* factors regardless of their relevance to the dispute at hand."[93] However, nothing in our decision should be read as encouraging parties or arbitrators to address *Allen* factors that are irrelevant to their particular cases. Instead, we emphasize that parties and arbitrators should continue to rely only on whatever interest-of-justice factors are relevant in the specific circumstances of their cases.

For the reasons set forth above, we apply the pre-*Local 1633* standards to the Agency's exceptions, which argue that the Arbitrator failed to properly analyze the *Allen* 2 "clearly without merit" standard.[94] As noted above, under pre-*Local 1633* precedent, that 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.[95]

Although the Arbitrator failed to clearly analyze that specific standard, the Arbitrator's factual findings and the record permit us to assess whether that standard is met. The Arbitrator found that "[t]he Agency's violation of failing to issue the letter was done without any rational[e] or basis,"[96] and that "[t]he Agency agreed a violation occurred."[97] The Agency has not filed nonfact exceptions to those findings – and, in fact, it concedes that it violated the CBA.[98] Further, the Arbitrator determined that "[t]he delay in issuing a letter was clearly without merit."[99] The Arbitrator's unchallenged factual findings and the Agency's concession support the Arbitrator's conclusion that the Agency's action was clearly without merit. Thus,

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[87] *See Simmons*, 31 M.S.P.R. 559; *Kent*, 33 M.S.P.R. 361; *see also Holmes v. OPM*, 99 M.S.P.R. 330 (2005). In fact, in *Simmons*, the MSPB noted that, "[a]lthough the *Allen* categories were developed in the context of an adverse[-]action appeal, the [MSPB] has applied them as well in other contexts such as [RIF] appeals . . . and performance-based actions." 31 M.S.P.R. at 564-65 (citations omitted). The MSPB noted, however, that in the RIF context, *Allen* 2's sub-category of "substantial innocence" does not apply. *Id.* at 565; *see also Kent*, 33 M.S.P.R. at 366 (noting that "the primary modification identified in *Simmons* was the exclusion of the 'substantial innocence' example from *Allen* [2]").

[88] We also note that, in *Local 1633*, the Authority adopted the revised standards "without even a passing reference to the views of parties that submitted briefs" in response to the Authority's *Federal Register* notice soliciting their opinions on this important issue. 71 FLRA at 219 (Separate Opinion of Member DuBester).

[89] We also note that, in a more recent, nonprecedential MSPB decision, the two sitting Members took different views of how *Allen* applies in OPM retirement-denial cases, with Chairman Harris suggesting a broader application than the test discussed in *Local 1633*. *See Wright v. OPM*, No. AT-0831-19-1079-A-1, 2024 WL 2796508, at *3-5 (MSPB May 30, 2024). Because her opinion is a nonprecedential opinion of a single Member, we do not rely on it. However, we note that it may call into question the future viability of the MSPB precedent upon which *Local 1633* relied.

[90] Concurrence/Dissent at 18.

[91] Exceptions Br. at 29, 31.

[92] *Id.* at 31-36, 40-44.

[93] Concurrence/Dissent at 20-21.

[94] Exceptions Br. at 31-36.

[95] *Chapter 32*, 68 FLRA at 691 (citing *U.S. Dep't of the Navy, Commander, Navy Region Haw., Fed. Fire Dep't, Naval Station Pearl Harbor, Honolulu, Haw.*, 64 FLRA 925, 929 (2010); *NAGE, Loc. R4-6*, 56 FLRA 1092, 1095 (2001)).

[96] Fee Award at 12.

[97] *Id.* at 13.

[98] *See, e.g.*, Exceptions Br. at 14.

[99] Fee Award at 13.

attorney fees were in the interest of justice under *Allen* 2, and we deny the Agency's exception for that reason.[100]

4. The amount of fees awarded fails to account for the grievant's limited success.

The Agency argues the award of the full requested amount of $30,283.75 in attorney fees is unreasonable and contrary to the BPA.[101] Specifically, the Agency argues that "the award should be significantly less than the amount requested in order to reflect the very limited success [that the g]rievant obtained" by only being awarded lost overtime amounting to $93.48 plus interest.[102]

The U.S. Supreme Court (the Court) has held that the extent to which a plaintiff prevailed in the underlying litigation is the most critical factor to consider in determining reasonable attorney fees.[103] The Court "observed that if 'a plaintiff 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.'"[104] Further, the Court has held that, in cases involving a single successful claim, "[a] reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole."[105] The Court also has stated that "[t]here is no precise rule or formula" for reducing attorney fees, and that the tribunal "may simply reduce the award to account for . . . limited success[,]" so long as the reduction is otherwise consistent with the principles that the Court identified.[106]

In light of this precedent, the Authority and the MSPB have held that, in determining the "reasonableness" of attorney fees under 5 U.S.C. § 7701(g), it is necessary to consider whether a fee award should be reduced because the relief ordered was significantly less than what was sought.[107] The Authority has similarly held that it is reasonable to reduce requested attorney fees based on the degree of success achieved at arbitration.[108]

Here, the Arbitrator concluded that the Union's requested attorney fees were reasonable. However, as discussed above, the Arbitrator based that conclusion only on general findings that: the Union articulated the time its attorneys spent performing legal work and demonstrated their bar admissions and their ascribed hourly fees and rates; and the activities described were compensable and the hours and dollar figure were "both reasonable."[109] The Arbitrator did not consider whether the requested amount

[100] The Agency also argues that the Arbitrator's "cursory analysis of the *Allen* factors failed to demonstrate that an award of attorney fees was in the interest of justice." Exceptions Br. at 36-42. However, as discussed above, the record supports a conclusion that the fee award was in the interest of justice. Thus, this argument is not persuasive. *See, e.g.*, *U.S. DOL*, 68 FLRA 779, 784 (2015) (finding contrary-to-law arguments unpersuasive and denying exception). Further, the Agency challenges the Arbitrator's findings that the Agency committed a prohibited personnel practice, *see* Exceptions Br. at 29-30, that it knew or should have known that it would not prevail on the merits, *see id.* at 31-34, and that it committed a gross procedural error, *id.* at 37-40. However, "the Authority has consistently held that, under *Allen*, the 'interest of justice requirement is satisfied *if any* of the five categories applies.'" *Workers' Comp.*, 72 FLRA at 491 (quoting *AFGE, Loc. 3294*, 66 FLRA 430, 431 (2012) (Member Beck dissenting)). As the fees here were warranted under *Allen* 2, it is unnecessary to resolve the Agency's remaining arguments on this issue. *See, e.g.*, *U.S. Dep't of the Army, Med. Activity (MEDDAC), Fort Drum, N.Y.*, 65 FLRA 575, 579 n.5 (2011) (finding it unnecessary to consider agency exceptions regarding *Allen* 2 where award satisfied *Allen* 5). Further, we note that when a party's sovereign-immunity claim depends on an argument that an arbitration award is contrary to the BPA, and the Authority finds that the award is consistent with the BPA, the Authority denies the sovereign-immunity claim. *U.S. DHS, U.S. CBP*, 68 FLRA 253, 258 (2015). Therefore, to the extent the Agency is arguing that the award is contrary to the doctrine of sovereign immunity, we deny that argument, consistent with our finding that the award is consistent with the BPA and 5 U.S.C. § 7701(g)(1) (except with respect to the amount of fees, as discussed below).

[101] Exceptions Br. at 44.

[102] *Id.*

[103] *Farrar*, 506 U.S. at 114; *see also NFFE, Forest Serv. Council, Loc. 1771*, 56 FLRA 737, 742 (2000) (*Forest Serv.*).

[104] *Farrar*, 506 U.S. at 114 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (*Hensley*)).

[105] *Hensley*, 461 U.S. at 440.

[106] *Id.* at 436-37.

[107] *Forest Serv.*, 56 FLRA at 742; *see also Stein v. U.S. Postal Serv.*, 65 M.S.P.R. 685, 690 (1994)).

[108] *See, e.g.*, *NAGE, Loc. R5-66*, 65 FLRA 452, 454 (2011) (*R5-66*).

[109] Fee Award at 14.

should be reduced because the relief ordered was significantly less than what the Union sought, based on the erroneous belief that there was no authority to do so.[110]

At the arbitration hearing, the Union argued that the grievant was owed $4,813.24 for twelve lost overtime opportunities as a result of the CBA violation.[111] The Arbitrator ultimately found that the grievant was only owed one hour of overtime pay, or $93.48, for a lost one-hour shift of administrative duty. As such, the relief the grievant obtained in this case was significantly less than what the Union initially sought.

In attorney-fee cases such as this, both the Authority and the MSPB have held the fact-finder is often in the best position to make determinations as to the reasonableness of the amount of fees claimed.[112] Consistent with this principle, we believe it is appropriate to remand this matter for a reassessment of the appropriate amount of fees, taking into account the grievant's limited degree of success.[113]

IV. Decision

We partially grant and partially deny the Agency's exceptions. We remand the case to the parties for resubmission to the Arbitrator, absent settlement, to reconsider the appropriate amount of attorney fees, taking into account the grievant's limited success.

[110] *Id.*
[111] *Id.* at 7-8; Exceptions Br. at 214 (Union's Post-Hearing Br.).
[112] *U.S. Dep't of VA, Med. Ctr., Detroit, Mich.*, 64 FLRA 794, 797 (2010) (citing *Ala. ACT*, 56 FLRA at 235; *Martinez v. U.S. Postal Serv.*, 89 M.S.P.R. 152, 162 (2001) (*Martinez*)).
[113] *Id.* (citing *Martinez*, 89 M.S.P.R. at 162 (remanding the case to the administrative judge to identify a precise number of hours to disallow for the unsuccessful claims or to reduce the award by an otherwise appropriate amount in order to account for the appellant's limited success)); *see also AFGE, Loc. 3354*, 66 FLRA 305, 306-07 (2011) (upholding an award where the arbitrator reduced the amount of attorney fees by fifty-percent after mitigating a five-day suspension to a letter of discipline); *R5-66*, 65 FLRA at 454 (upholding an award where the arbitrator reduced the attorney fees by more than half in order to reflect the grievant's degree of success); *NAGE, Loc. R4-6*, 54 FLRA 1594, 1599-1600 (1998) (upholding the arbitrator's decision to reduce the requested attorney fees by seventy-five percent because the grievance had requested eight hours of administrative leave but the arbitrator only granted two hours).

Member Kiko, concurring in part and dissenting in part:

I agree with the majority's disposition of the Agency's exceptions and the decision to remand the matter for a reassessment of the appropriate amount of attorney fees.

However, I disagree with the majority's decision to abandon the guidance that the Authority provided in *AFGE, Local 1633* (*Local 1633*).[1] Prior to *Local 1633*, the Authority repeatedly announced the need to revisit how it evaluates whether attorney fees are warranted in the interest of justice.[2] In *Local 1633*, the Authority took that long-awaited action: it crafted guidance that directed arbitrators to engage in a more efficient analysis by focusing on only the most relevant *Allen* factors in a non-disciplinary grievance.[3] The majority discards this guidance without providing any replacement. As neither party asked us to reconsider *Local 1633*, and the majority makes no effort to substitute *Local 1633*'s guidance with its own, I dissent to the majority's sua sponte rejection of Authority precedent merely for the sake of change.

As the majority notes, 5 U.S.C. § 7701(g) permits an award of attorney fees only where such an award is "warranted in the interest of justice."[4] On an adverse-action appeal in *Allen v. Postal Service* (*Allen*), the Merit Systems Protection Board (MSPB) identified five factors that it determined support awarding attorney fees in the interest of justice.[5] The MSPB stressed that this list was "not exhaustive, but illustrative," and that it was intended as "directional markers" rather than a "catalogue of litmus paper tests for [the] award or denial of attorney fees."[6]

The MSPB has acknowledged that it developed the *Allen* factors specifically for the context of an adverse-action appeal but has applied these factors—with modifications—in non-disciplinary cases.[7] For example, in *Simmons v. OPM*, the MSPB modified the second *Allen* factor when it found that the "substantial innocence" component of that factor is irrelevant to retirement and reduction-in-force appeals because, in both of those case types, no charges of misconduct are leveled against the employee.[8] And, as relevant here, the MSPB found in *Holmes v. OPM* (*Holmes*) that, "[i]n retirement appeals, . . . the most relevant categories for determining whether an award is in the interest of justice are whether" the agency's action was clearly without merit (the second factor) and whether the agency knew or should have known when it made its decision that it would not prevail

[1] 71 FLRA 211 (2019) (Member Abbott concurring; Member DuBester concurring in part, dissenting in part).
[2] *E.g.*, *Fraternal Ord. of Police, Lodge No. 168*, 70 FLRA 338, 340 (2017) (*Lodge No. 168*) ("[T]he Authority, as it has stated before, needs interest-of-justice factors that are better adapted . . . to the types of cases that the Authority is called upon to review[,] such as . . . where an adverse action is not at issue." (internal quotation marks omitted)); *NAIL, Loc. 5*, 69 FLRA 573, 577-78 (2016) (*NAIL*) (noting that the Authority should "reconsider [its] nearly exclusive reliance on the *Allen* factors" when determining whether attorney fees are warranted in the interest of justice); *U.S. DHS, U.S. CBP*, 70 FLRA 73, 76 (2016) (*CBP*) (same); *AFGE, Loc. 2002*, 70 FLRA 812, 814 n.25 (2018) (*Loc. 2002*) (same); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Pollock, La.*, 70 FLRA 195, 196 n.15 (2017) (*DOJ*) (same); *AFGE, Council of Prison Locs., Loc. 1010*, 70 FLRA 8, 9 n.17 (2016) (*Loc. 1010*) (same); *NTEU*, 69 FLRA 614, 618 n.45 (2016) (*NTEU*) (same).
[3] *Local 1633*, 71 FLRA at 216-17.
[4] 5 U.S.C. § 7701(g)(1).
[5] 2 M.S.P.R. 420, 434-35 (1980). The five *Allen* factors are: (1) the agency engaged in a prohibited personnel practice; (2) the agency's action was clearly without merit, or was wholly unfounded, or the employee is substantially innocent of the charges brought by the agency; (3) the agency initiated the action against the employee in bad faith, including where the agency's action was brought to harass the employee or was brought to exert improper pressure on the employee to act in certain ways; (4) the agency committed a gross procedural error which rolonged the proceeding or severely prejudiced the employee; or (5) the agency knew or should have known that it would not prevail on the merits when it brought the proceeding. *Id.*
[6] *Id.* at 435.
[7] *Kent v. OPM*, 33 M.S.P.R. 361, 366 (1987) (*Kent*).
[8] 31 M.S.P.R. 559, 565 (1986) (excluding the "substantial innocence" component of the second factor for retirement-benefits appeals because it was irrelevant to question before the MSBP); *see also Johnson v. Dep't of the Interior*, 24 M.S.P.R. 209, 213 (1984) (excluding the "substantial innocence" component for reduction-in-force appeals).

on appeal (the fifth factor).[9]

Although the Authority applies the MSPB's *Allen* factors to analyze whether attorney fees are warranted in the interest of justice,[10] the Authority has recognized that the *Allen* factors are not a perfect fit in the collective-bargaining context for cases that do not involve discipline.[11] Therefore, prior to *Local 1633*, the Authority repeatedly announced its intention to "fashion interest-of-justice guidelines that are better adapted to the collective-bargaining context and to the types of cases that the Authority is called upon to review."[12]

In *Local 1633*, after issuing a Federal Register notice soliciting briefs from the labor-management community on possible changes to the interest-of-justice analysis,[13] the Authority "reaffirm[ed]" its reliance on the *Allen* factors.[14] But it also "clarif[ied] that, in arbitration cases where the grieved action is not disciplinary in nature, the interest[-]of[-]justice analysis should focus" on the factors most relevant to the collective-bargaining context.[15] Drawing an analogy to the MSPB's reasoning in *Holmes*, the Authority determined that the second and fifth factors were the two most relevant considerations for the interest-of-justice analysis in non-disciplinary disputes.[16] Notwithstanding this determination, the Authority acknowledged that arbitrators may consider the other *Allen* factors when they are relevant.[17] It did not, as the majority contends, "hold or imply that only *Allen* [two] and [five] may apply in non-disciplinary cases."[18] Instead, this guidance permitted arbitrators to conduct more efficient analyses by focusing on only the most salient considerations for awarding attorney fees in each

[9] 99 M.S.P.R. 330, ¶ 6 (2005) (citing *Goldbach v. OPM*, 49 M.S.P.R. 9, 14-15 (1991); *Kent*, 33 M.S.P.R. at 365-69).
[10] *AFGE, Loc. 3294*, 66 FLRA 430, 431 (2012).
[11] *Lodge No. 168*, 70 FLRA at 340 ("As Congress established the Authority and the MSPB for very different purposes, the Authority should develop interest-of-justice factors that serve the purposes of *its* organic statute – not the MSPB's." (internal quotation marks omitted)); *NAIL*, 69 FLRA at 577-78 ("[T]aking into account the very different purposes for which Congress established the Authority and the MSPB, we believe that it may be time – in an appropriate case – to reconsider our nearly exclusive reliance on the *Allen* factors in this area.").
[12] *NAIL*, 69 FLRA at 577-78; *see also Lodge No. 168*, 70 FLRA at 340 (noting that "the Authority . . . needs interest-of-justice factors that are better adapted . . . to the types of cases that the Authority is called upon to review" (internal quotation marks omitted)); *CBP*, 70 FLRA at 76 ("As we have stated before, . . . there is a need for the Authority 'to reconsider our nearly exclusive reliance on the *Allen* factors in this area . . . .'" (quoting *NAIL*, 69 FLRA at 577-78)). *Cf. Loc. 2002*, 70 FLRA at 814 n.25 (citing with approval decisions in which the Authority has opined that the manner in which the Authority evaluates attorney fees may warrant a fresh look to create a standard more suitable to the collective-bargaining context); *DOJ*, 70 FLRA at 196 n.15 (same); *Loc. 1010*, 70 FLRA at 9 n.17 (same); *NTEU*, 69 FLRA at 618 n.45 (same).
[13] Notice of Opportunity to Submit Amici Curiae Briefs in an Arbitration Appeal Pending Before the Federal Labor Relations Authority, 84 Fed. Reg. 7053 (Mar 1, 2019) (Member DuBester dissenting).
[14] *Local 1633*, 71 FLRA at 211.
[15] *Id.* (internal quotation marks omitted).
[16] *Id.* at 216-17 (citing *Holmes*, 99 M.S.P.R. at ¶ 6; *Kent*, 33 M.S.P.R. at 366).
[17] *Id.* at 217; *see also id.* at 217 n.61 (noting, for example, that the interest-of-justice requirement would be satisfied where an agency committed a prohibited personnel practice as defined by 5 U.S.C. § 2302(b)—the first *Allen* factor).
[18] Majority at 10.

circumstance.[19]

While the majority stresses that "nothing in [its] decision should be read as encouraging parties or arbitrators to address *Allen* factors that are irrelevant to their particular cases,"[20] such an outcome is the natural consequence of the majority's decision. By overturning guidance intended to focus review on the most relevant *Allen* factors, the majority signals that arbitrators should expend time and effort considering each of the *Allen* factors regardless of their relevance to the dispute at hand. Attempting to justify this decision, the majority superfluously explains that the MSPB chose to focus on the second and fifth factors only in the "OPM-retirement context."[21] And the majority needlessly stresses that the MSPB "gave no indication" that these modifications were intended to "apply in all non-disciplinary cases."[22]

The majority need not have taken such pains to explain that the MSPB intended for its *Holmes* decision to apply only to non-disciplinary MSPB cases; no one has suggested otherwise. It is hardly surprising that the MSPB never signaled an intention to apply *Holmes* to non-disciplinary grievances raised under parties' collective-bargaining agreements given that the MSPB does not have jurisdiction over such disputes. As the majority is aware, the Authority did not claim in *Local 1633* that MSPB precedent *required* the Authority to adopt the same modifications to the *Allen* factors for non-disciplinary cases. And the majority does not suggest that the Authority is bound to strictly abide by MSPB precedent when determining how best to apply the *Allen* factors in the collective-bargaining context. Thus, it is unclear how the majority can rely on the absence of

[19] The majority also notes that, "in *Local 1633*, the Authority adopted the revised standards 'without even a passing reference to the views of parties that submitted [amici] briefs'" on the matter. *Id.* at 14 n.88 (quoting *Local 1633*, 71 FLRA at 219 Separate Opinion of Member DuBester)). That the *Local 1633* majority did not discuss the eight timely briefs does not mean the majority did not consider them. Indeed, in reversing *Local 1633*, the majority does not discuss them either. Although the briefs are public records, in the interest of transparency I note that:

(a) Five of the amici argued the Authority should not adopt new interest-of-justice standards – which is consistent with *Local 1633*'s statement that the Authority was "not free to fashion its own standards for attorney fees under the [Back Pay Act], but is constrained to follow the same standards applied by the [MSPB] under § 7701(g)." *Local 1633*, 71 FLRA at 215. *See* Amici Curiae Brs. of AFGE; AFGE, Nat'l Border Patrol Council; NTEU; Dep't of Treasury; Fed. Educ. Ass'n.

(b) One amicus argued the Authority should "no longer rely on the *Allen* factors and[,] instead, develop criteria for attorney fee awards that better align with the clear statutory requirements of [§] 7701(g)(1)." Amicus Curiae Br. of SSA at 5. As noted above, the Authority clarified that it was "not free to fashion its own [interest-of-justice] standards." *Local 1633*, 71 FLRA at 215.

(c) Two amici advocated adopting guidance within Chairman Calhoun's concurrence in *Naval Air Development Center, Department of the Navy*, 21 FLRA 131, 137 (1986), but as this concurrence largely concerned *disciplinary* cases, it was not relevant to the Authority's application of the *Allen* factors in *non-disciplinary* cases. *See* Amici Curiae Brs. of AFGE, Nat'l Border Patrol Council & Fed. Educ. Ass'n.

(d) One amicus argued that the Authority's non-disciplinary cases "do not fit within the MSPB's [*Allen*] model" because "[b]ad faith or a variant of bad faith does not ordinarily enter the picture." Amicus Curiae Br. of Peter Broida at 3-4. Instead, that amicus argued that, in non-disciplinary cases, "[t]he key to fee entitlement would be the availability to management of compelling, rather than competing, information demonstrating that management should have been aware that its position would not be sustained" – i.e., the fifth *Allen* factor. *Id.* at 5. *See Local 1633*, 71 FLRA at 216-217 (finding the most relevant *Allen* factors in non-disciplinary cases are the second and fifth).

[20] Majority at 14.

[21] *Id.* at 13.

[22] *Id.*

directly applicable MSPB precedent as a basis for reversing *Local 1633*.[23]

Willfully misunderstanding *Local 1633*, the majority suggests that the Authority both incorrectly relied on MSPB precedent in order to focus on the second and fifth *Allen* factors[24] and rejected longstanding Authority precedent applying those *Allen* factors[25] – neither is the case. After determining that certain MSPB decisions provided useful guidance, the Authority drew on the MSPB's reasoning in *Holmes* by analogy. Like the MSPB did for retirement-benefits appeals, the Authority found that it was appropriate to (1) identify the most relevant *Allen* factors for determining whether a fee award in a non-disciplinary case is in the interest of justice, and (2) adapt those factors to the collective-bargaining context.

Although the majority acknowledges that "*Allen* [two] and [five] may often be more relevant than the other *Allen* factors in assessing the interest-of-justice standard in non-disciplinary cases," the majority concludes that *Local 1633*'s guidance is "unnecessarily restrictive and misleading."[26] According to the majority, "it is not uncommon for the Authority to resolve arbitration appeals involving non-disciplinary actions that are alleged to constitute prohibited personnel practices."[27] However, *Local 1633* explicitly provides that, if a grievant alleges an agency committed a prohibited personnel practice – as defined by 5 U.S.C. § 2302(b) – then the first *Allen* factor would be relevant to assessing whether attorney fees are appropriate.[28] At the same time, parties and arbitrators often conflate the Back Pay Act's requirement that the grievant suffered an "unjustified and unwarranted personnel action"[29] with the distinct *Allen*-factor requirement that an agency committed a "prohibited personnel practice."[30] In fact, the Arbitrator in

[23] The majority also cites a recent, non-precedential MSPB split decision, noting that "the two sitting Members[']. . . different views on how *Allen* applies in OPM retirement-denial cases . . . may call into question the future viability of the MSPB precedent upon which *Local 1633* relied." *Id.* at 14 n.89 (citing *Wright v. OPM*, No. AT-0831-19-1079-A-1, 2024 WL 2796508, at *3-5 (MSPB May 30, 2024) (*Wright*)). However, as noted above, the Authority did not *rely* on MSPB precedent in *Local 1633*; instead, it drew on the MSPB's reasoning in *Holmes* by analogy, noting that OPM-retirement appeals share "helpful[]" similarities with non-disciplinary appeals in the collective-bargaining context. *See Local 1633*, 71 FLRA at 216-17 (citing *Holmes*, 99 M.S.P.R. at ¶ 6). Moreover, nothing in *Wright* conflicts with *Local 1633* or the MSPB's reasoning in *Holmes*. Vice Chairman Limon cited *Holmes* favorably and reiterated the very distinction between disciplinary and non-disciplinary cases that the Authority drew on in *Local 1633*. *Wright*, 2024 WL 2796508, at *5 (Separate Opinion of Vice Chairman Limon) ("The [MSPB] has approached the 'knew or should have known' question in retirement cases differently from the way it has addressed that inquiry in adverse action cases, taking into account the fact that the *Allen* categories were developed within the context of an adverse action appeal."). Chairman Harris agreed that "[t]he fifth [*Allen* factor wa]s the most relevant" to the non-disciplinary case, but she disagreed with an administrative judge's narrow application of that factor. *Id.* at *4 (Separate Opinion of Chairman Harris) (concluding that the administrative judge applied the fifth *Allen* factor too narrowly by failing to find that the agency prepared its case "so negligently" as to miss key facts). Neither Member indicated disagreement with the *Holmes* reasoning or suggested the administrative judge should have considered any other *Allen* factors. To the extent the majority attempts to forecast that Chairman Harris's "broader application" of the fifth *Allen* factor may become precedent in a future MSPB decision, Majority at 14 n.89, nothing in *Local 1633* would prevent an arbitrator from considering such precedent when applying that factor.

[24] *See* Majority at 13 ("The MSPB gave no indication that these modifications were intended to apply to cases that did not involve disability-retirement appeals – let alone that they should apply in all non-disciplinary cases.").

[25] *See id.* at 13-14 (emphasizing that "both the MSPB's and the Authority's longstanding applications of *Allen* [two] and [five] have created a rich body of precedent that the Authority may draw from in deciding attorney-fee cases involving those factors").

[26] *Id.* at 9-10.

[27] *Id.* at 9.

[28] *Local 1633*, 71 FLRA at 217 n.61 (noting 5 U.S.C. § 7701(g)(1) "expressly contemplates that the interest[-]of[-]justice requirement will be satisfied where the agency engaged in a prohibited personnel practice").

[29] 5 U.S.C. § 5596(b)(1) (providing that backpay may be awarded to an employee "found by appropriate authority . . . to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee").

[30] *See, e.g.*, *U.S. DHS, U.S. CBP*, 69 FLRA 412, 414 (2016) (*U.S. DHS*) (Member Pizzella concurring) (setting aside award of attorney fees where arbitrator "conflated the requirement for an award of backpay under the [Back Pay Act]—that a grievant is affected by *an unjustified or unwarranted personnel* action—with the requirement for an award of attorney fees under § 7701(g)(1) and the first *Allen* criterion—that an agency engaged in a *prohibited personnel practice*").

the fee award at issue made that very mistake.[31] *Local 1633* expressly permitted arbitrators to consider alleged prohibited personnel practices while highlighting this important distinction.[32]

Regarding the third and fourth *Allen* factors, *Local 1633* provided that, in the "exceptional circumstances" where a non-disciplinary grievance concerns an action initiated against an employee in bad faith or where an agency committed a gross procedural error which prolonged a proceeding or severely prejudiced an employee, the arbitrator should apply the third or fourth *Allen* factors, respectively.[33] But, as the cases the majority cites demonstrate effectively, these factors are generally *not* applicable in non-disciplinary grievances.[34] Thus, I do not agree that directing arbitrators to apply only the relevant factors is "unnecessarily restrictive [or] misleading."[35] On the contrary, as arbitrators need only find one of the *Allen* factors has been met to award attorney fees, *Local 1633* increased efficiency by focusing arbitrators' analyses on the factors most likely to conclusively determine whether attorney fees are appropriate.

Additionally, the majority extensively quotes *Local 1633*'s guidance concerning the second and fifth *Allen* factors, claiming that the Authority "disregard[ed] . . . longstanding precedent."[36] However, as the majority acknowledges, this guidance was based on MSPB precedent concerning how the *Allen* factors apply in non-disciplinary cases.[37] As the principles the majority highlights from *Local 1633* are well supported in MSPB case law,[38] I fail to see how quoting them supports the majority proposition that *Local 1633* disregarded precedent.

Ignoring *Local 1633*'s reliance on longstanding MSPB precedent, the majority claims the Authority "erred in modifying how *Allen* [two] and [five] apply in non-disciplinary cases" because the MSPB and the Authority have a "rich body of precedent" guiding application of these factors.[39] I agree that this precedent is a valuable guide, which is why nothing in *Local 1633* overturned any existing Authority *Allen*-factor precedent. In fact, since *Local 1633*, the Authority has continued to rely on the same "rich body"[40] of Authority and MSPB precedent when evaluating whether arbitrators properly

[31] *Compare* Fee Award at 12 (finding the first *Allen* factor was met because "the Agency engaged in a prohibited personnel practice when it violated the collective[-]bargaining agreement"), *with U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Tucson, Ariz.*, 64 FLRA 819, 821 (2010) (rejecting argument that arbitrator's finding that agency committed an "unwarranted or unjustified personnel action" when it violated the parties' collective-bargaining agreement required the arbitrator to find the agency committed a prohibited personnel practice, because union did not establish any of the twelve types of prohibited personnel practices set out in 5 U.S.C. § 2302(b) were involved); *see also* Majority at 15 n.100 (finding it unnecessary to consider whether the Arbitrator properly applied the first *Allen* factor because the Arbitrator properly found the second factor was met).

[32] *Local 1633*, 71 FLRA at 217 n.61 (clarifying 5 U.S.C. § 7701(g)(1)'s reference to fees being warranted in the interest of justice whenever an agency engaged in a "prohibited personnel practice" refers specifically to those practices as defined in 5 U.S.C. § 2302(b) "and does not encompass every situation in which the agency's action is found to be an unjustified or unwarranted personnel action for purposes of the [Back Pay Act]" (citing *U.S. DHS*, 69 FLRA at 415)).

[33] *Id.* at 217.

[34] Majority at 10 n.66 (citing *NAIL*, 69 FLRA at 576-77 (upholding arbitrator's finding that the fourth *Allen* factor was *not* met); *AFGE, Council 220*, 61 FLRA 582, 585-86 (2006) (*Council 220*) (upholding arbitrator's findings that the third and fourth *Allen* factors were *not* met)).

[35] *Id.* at 9.

[36] *Id.* at 12.

[37] *Id.* at 10 (noting that, in "modif[ying] how *Allen* [two] and [five] apply in non-disciplinary cases, [the Authority] cit[ed] MSPB 'cases in which an applicant for retirement benefits successfully appeals an unfavorable reconsideration decision by the Office of Personnel Management'" (quoting *Local 1633*, 71 FLRA at 216)).

[38] *See, e.g.*, *Foster v. OPM*, 35 M.S.P.R. 445, 448 (1987) ("*Allen* category five requires an evaluation of the record before [the agency] at the time the . . . decision was made. Only if it is found that the agency was negligent in its processing [of this decision], or that it lacked a reasonable and supportable explanation [for its action], can it be concluded that [the agency] knew or should have known that it could not prevail."); *id.* at 449 (noting that, in evaluating the second *Allen* factor, the MSPB "must consider whether the agency's failure, at some point prior to the close of the appellate record, to acknowledge the appellant's entitlements to benefits was blameworthy"); *Short v. OPM*, 71 M.S.P.R. 136, 141 (1996) (noting that the second factor "does not require an award of fees in every case where the appellant prevails at the hearing . . . [but] only in those cases where the appellant has presented evidence so compelling that [the agency] cannot thereafter reasonably dispute the appellant's entitlement to benefits, but where [the agency] continues to do so").

[39] Majority at 13-14.

[40] *Id.* The majority finds attorney fees were warranted because, "under pre-*Local 1633* precedent, [the second *Allen* factor] 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." *Id.* at 14. But the Authority would have applied the same standards under *Local 1633*.

applied the second and fifth *Allen* factors.[41] Because *Local 1633* relied on MSPB precedent and the Authority *continued* to apply MSPB and Authority precedent, I disagree with the majority's premise that *Local 1633* "modif[ied] how *Allen* [two] and [five] apply in non-disciplinary cases."[42] Moreover, the majority provides no support for its conclusion that *Local 1633* "created a misimpression that arbitrators and parties should not look to the other *Allen* factors" when they are relevant; such a conclusion is not supported by the plain wording of *Local 1633*,[43] and I have seen no evidence suggesting *Local 1633* has caused arbitrators to disregard relevant *Allen* factors.

As neither party asked the Authority to reconsider its decision in *Local 1633*, or argued that the arbitrator overlooked a relevant *Allen* factor, I disagree that overturning *Local 1633* is necessary in this case. *Local 1633* provided long-awaited guidance[44] to streamline an "unnecessarily cumbersome and impractical" standard.[45] Because overturning this guidance—without an adequate replacement—disadvantages the labor-management community simply for the sake of overturning precedent, I dissent from this part of the decision.

[41] *See, e.g.*, *U.S. DHS, U.S. CBP*, 72 FLRA 463, 465-66 (2021) (*DHS*) (Chairman DuBester concurring; Member Abbott concurring) (citing *CBP*, 70 FLRA at 76; *Council 220*, 61 FLRA at 586) (vacating award where arbitrator's application of the third, fourth, and fifth factors did not comply with Authority precedent); *U.S. DHS, CBP, U.S. Border Patrol, El Paso Sector*, 71 FLRA 597, 600-01 (2020) (Member DuBester dissenting) (citing *CBP*, 70 FLRA at 76; *NAIL*, 69 FLRA at 577; *Baldwin v. Dep't of VA*, 115 M.S.P.R. 413, 420 (2010)) (vacating award where arbitrator's application of the first, fourth, and fifth factors did not comply with Authority or MSPB precedent).

[42] Majority at 13-14.

[43] *See Local 1633*, 71 FLRA at 217 ("There may be exceptional circumstances in which other considerations are relevant, but in most cases it will be sufficient to apply the 'knew or should have known' or the 'clearly without merit' criteria.").

[44] *E.g.*, *Lodge No. 168*, 70 FLRA at 340 ("[T]he Authority, as it has stated before, needs interest-of-justice factors that are better adapted . . . to the types of cases that the Authority is called upon to review – such as . . . where an adverse action is not at issue." (internal quotation marks omitted)); *CBP*, 70 FLRA at 76 ("As we have stated before, . . . there is a need for the Authority 'to reconsider our nearly exclusive reliance on the *Allen* factors in this area . . . .'" (quoting *NAIL*, 69 FLRA at 577-78)).

[45] *Local 1633*, 71 FLRA at 219 (Dissenting Opinion of Member DuBester).