

**69 FLRA No. 76**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 2583  
(Union)

and

UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS  
PORTLAND HEALTHCARE SYSTEM  
VANCOUVER, WASHINGTON  
(Agency)

0-AR-5188

—  
DECISION

August 25, 2016

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

**I. Statement of the Case**

Arbitrator Jonathan S. Monat issued an award finding that the Agency had violated the parties' collective-bargaining agreement when it improperly withheld state income taxes from the grievant's pay. The Arbitrator awarded backpay under the Back Pay Act<sup>1</sup> (Act) but denied the Union's request for attorney fees because he found that the Agency's actions were not "willful, malicious[,] or discriminatory."<sup>2</sup>

The Union raises one exception to the award. The Union alleges that the Arbitrator's denial of attorney fees is contrary to the Act because the Arbitrator applied a standard not required by the Act. Because the denial of attorney fees is contrary to the Act and the record is insufficient for the Authority to make an ultimate finding on the issue of attorney fees, we set aside this portion of the award and remand this portion of the award to the parties, absent settlement, for resubmission to the Arbitrator.

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

The grievant works for the Agency and lives in the state of Washington. At a certain point in time, the Agency, in its payroll system, coded the grievant as living in Oregon, rather than Washington. As a result, the Agency began deducting Oregon income tax from the grievant's pay. Oregon has a state income tax while Washington does not. The grievant became aware of the error and informed the Agency, but the improper deductions continued. After further delay, the grievant devised his own temporary solution and claimed ninety-nine dependents in order to lower his state-income-tax deduction to zero. The Agency eventually corrected the coding error; however, it refused to refund the deducted money, and instead claimed the grievant had to seek a refund from the state of Oregon himself. In response to the Agency's actions, the Union filed a grievance. The parties did not resolve the grievance, and they submitted the issue to arbitration.

At arbitration, the Arbitrator addressed the issue of whether the Agency violated the parties' agreement "when it underpaid" the grievant and, if so, what is the proper remedy.<sup>3</sup>

Before the Arbitrator, the Union argued that the Agency violated the parties' agreement when it improperly withheld taxes from the grievant's pay. The Union also alleged that the Agency violated federal law and its own policies in improperly withholding pay from the grievant. Additionally, the Union argued that the Agency should repay the grievant the amount improperly deducted. The Union also requested attorney fees under the Act.

The Agency argued that it was not responsible for underpaying the grievant because the grievant should have noticed the error earlier and notified the Agency. The Agency also contended that the grievant was responsible for getting any refund of tax deductions and that he should file an amended tax return in order to get relief.

The Arbitrator found that "[w]ithout question, the improper withholding was entirely the Agency's fault."<sup>4</sup> The Arbitrator also found that "the Agency has the ability to reverse the withholding."<sup>5</sup> In conclusion, the Arbitrator determined that "[t]he Agency violated the [parties' agreement] when it underpaid the grievant" due to the improper tax deductions.<sup>6</sup> As a remedy, the Arbitrator ordered the Agency to "repay the grievant

<sup>1</sup> 5 U.S.C. § 5596.

<sup>2</sup> Award at 7.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.* at 5.

<sup>5</sup> *Id.* at 7.

<sup>6</sup> *Id.* at 8.

immediately” under the Act.<sup>7</sup> However, the Arbitrator also ordered that “[a]ttorney fees will not be awarded because there is no evidence that the Agency’s actions were willful, malicious[,] or discriminatory.”<sup>8</sup>

The Union filed an exception to the award, and the Agency did not file an opposition.

### III. Analysis and Conclusion: The award is contrary to the Act.

The Union alleges that the award is contrary to the Act.<sup>9</sup> We review the questions of law raised by the Union’s exception de novo.<sup>10</sup> 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.<sup>11</sup> In making that assessment, the Authority defers to the arbitrator’s underlying factual findings unless the excepting party establishes that they are nonfacts.<sup>12</sup>

The Union notes that the Arbitrator denied the Union’s request for attorney fees because “there is no evidence that the Agency’s actions were willful, malicious[,] or discriminatory”<sup>13</sup> but argues that the Act “carries with it no such onerous proof requirements.”<sup>14</sup>

The Authority has long held that, when resolving a request for attorney fees under the Act, arbitrators must set forth specific findings supporting their determinations on each pertinent statutory requirement.<sup>15</sup> When an arbitrator does not set forth specific findings supporting his or her determinations, the Authority will examine the record to determine whether it permits the Authority to resolve the matter.<sup>16</sup> If the record does, then the Authority will modify the award or deny the exception as appropriate. If the record does not, then the Authority will remand the award for further proceedings.<sup>17</sup> In conducting a de novo review, although deferring to the facts found by the arbitrator, the Authority will find deficient legal conclusions that are unsupported by the facts.<sup>18</sup>

The threshold requirement for entitlement to attorney fees under the Act is a finding that an employee (1) “ha[s] been affected by an unjustified or unwarranted personnel action” (2) “which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee.”<sup>19</sup> Here, the Arbitrator made findings satisfying each of the threshold requirements for attorney fees under the Act. In particular, the Arbitrator found that: (1) “[t]he Agency violated the [parties’ agreement],”<sup>20</sup> which constitutes an unjustified and unwarranted personnel action;<sup>21</sup> and (2) “[b]y erroneously withholding Oregon income tax from the grievant’s check, the Agency has underpaid the grievant.”<sup>22</sup> These findings satisfy the threshold requirements for an award of attorney fees under the Act in this case.

However, in addition to the threshold requirements, the Act further requires that an award of fees 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 standards established under 5 U.S.C. § 7701(g), which pertains to attorney fees awarded by the Merit Systems Protection Board.<sup>23</sup> The prerequisites for an award under 5 U.S.C. § 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.<sup>24</sup>

Furthermore, the Authority analyzes whether attorney fees are warranted in the interest of justice by considering the criteria established in *Allen v. U.S. Postal Service, (Allen)*.<sup>25</sup> In *Allen*, the Merit Systems Protection Board 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; and (5) where the agency knew or should have known that it would not

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 7.

<sup>9</sup> Exceptions at 4.

<sup>10</sup> *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995).

<sup>11</sup> *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).

<sup>12</sup> *U.S. Dep’t of the A.F., Warner Robins Air Logistics Complex Robins A.F. Base, Ga.*, 68 FLRA 102, 103 (2014).

<sup>13</sup> Award at 7.

<sup>14</sup> Exceptions at 7.

<sup>15</sup> *U.S. DHS, U.S. CBP*, 66 FLRA 335, 341 (2011) (*DHS*).

<sup>16</sup> *NAGE, SEIU, Local 551*, 68 FLRA 285, 289 (2015) (citing *DHS*, 66 FLRA at 341).

<sup>17</sup> *USDA, Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 53 FLRA 1688, 1694 (1998).

<sup>18</sup> *NAGE, Local R5-188*, 54 FLRA 1401, 1405-06 (1998).

<sup>19</sup> 5 U.S.C. § 5596(b)(1).

<sup>20</sup> Award at 8.

<sup>21</sup> *U.S. Dep’t of the Treasury, IRS, St. Louis*, 67 FLRA 101, 105 (2012) (“[A] violation of the parties’ agreement constitutes an unjustified and unwarranted personnel action.”).

<sup>22</sup> Award at 6.

<sup>23</sup> *U.S. DOD, Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 158 (1995).

<sup>24</sup> *Id.*

<sup>25</sup> See *Naval Air Dev. Ctr.*, 21 FLRA 131, 136-39 (1986) (*NADC*) (adopting the *Allen* criteria).

prevail on the merits when it brought the proceeding.<sup>26</sup> Additionally, an award of attorney fees is warranted in the interest of justice when there is a service to the federal workforce or a benefit to the public derived from maintaining the action.<sup>27</sup>

As noted above, the Arbitrator in this case denied attorney fees because “there is no evidence that the Agency’s actions were willful, malicious[,] or discriminatory.”<sup>28</sup> However, the Union is correct that a finding of willful, malicious, or discriminatory conduct is not necessary in order to satisfy the above standards. Further, the Arbitrator did not fully address any of the requirements beyond the threshold requirements for an award of attorney fees under the Act, and the record is insufficient to permit the Authority to resolve whether the denial of fees satisfies those requirements. Therefore, we find that the Arbitrator’s denial of fees is contrary to the Act.

Because the award is contrary to the Act, but the record is insufficient to evaluate the additional requirements for an award of attorney fees, we set aside that portion of the award and remand the award to the parties for further proceedings, absent settlement, to address the Union’s request for attorney fees.<sup>29</sup>

#### **IV. Decision**

We grant the Union’s contrary-to-law exception, and we remand this case to the parties for further proceedings, absent settlement.

---

<sup>26</sup> *Allen v. U.S. Postal Serv.*, 2 M.S.P.R. 420, 434-35 (1980).

<sup>27</sup> *NADC*, 21 FLRA at 139 (citing *Wells v. Harris*, 2 M.S.P.R. 409 (1980)).

<sup>28</sup> Award at 7.

<sup>29</sup> *DHS*, 66 FLRA 335, 341 (2011).