

II. Statement of Case

On February 26, 2018, the parties met for arbitration. The Arbitrator issued a decision in favor of AFGE on the merits. The Arbitrator held that neither party was eligible for attorney fees.

III. Arbitration

The Arbitrator issued a single sentence within the Award to deny both parties attorney fees. The Arbitrator stated that “[b]oth parties are denied attorney’s fees.”

IV. Position of the Parties

A. AFGE’s Position

AFGE asserts that the Award is contrary to law and public policy because the Arbitrator did not permit the submission of an attorney fees request and summarily denied fees without explanation. AFGE argues that the Award is not only contrary to the law but also violates the express provision of the CBA which requires attorney fees to be analyzed under the Federal Back Pay Act.¹ AFGE argues that the single sentence, “[b]oth parties are denied attorney’s fees” provided insufficient analysis under the Federal Back Pay Act.²

B. DMV’s Position

DMV argues that PERB should leave this portion of the decision undisturbed because the parties agreed to be bound by the Arbitrator’s decision by submitting a grievance to the Arbitrator. Furthermore, the Arbitrator had the full authority to craft an equitable remedy and AFGE merely disagrees with the Arbitrator’s findings.³

V. Discussion

The law and public policy exception is “extremely narrow.” The narrow scope limits potentially intrusive judicial reviews under the guise of public policy.⁴ AFGE has the burden to demonstrate that the Award would cause an explicit violation of “well defined public policy grounded in law and or a legal precedent.” The violation must be so significant that the law or public policy mandates a different result.⁵ Here, the Arbitrator’s single sentence determination that neither party was eligible for attorney fees is contrary to the law and public policy.

Attorney fees incurred in successfully challenging an unjustified or unwarranted personnel action may be awarded to employees of the District of Columbia in the same way they are awarded under the Federal Back Pay Act, 5 U.S.C. §5596 et seq.⁶ Under 5 U.S.C. (b)(1)(A)(ii) an employee who is the prevailing party following review of a personnel action is eligible to recover attorney

¹ Request at 3.

² Request at 5.

³ Opposition at 3-4.

⁴ *MPD v. FOP/MPD Labor Committee ex rel. Pair*, 61 D.C. Reg. 11609, Slip Op. 1487 at 8, PERB Case No. 9-A-05 (2014). See *MPD v. FOP/MPD Labor Committee ex rel. Johnson*, 59 D.C. Reg. 3959, Slip Op. 925 at 11-12, PERB Case No. 08-A-01 (2012).

⁵ *Id.*

⁶ See, *Surgent v. District of Columbia*, 683 A 2d. 493, 495 (D.C. 1996).

fees where the payment of fees is warranted in the “interest of justice”.⁷ Additionally, Article 9 Section F (17) of the parties CBA states that “the arbitrator’s decision shall be subject to the Federal Back Pay Act.”

The Federal Back Pay Act requires the decision maker to analyze the merits of an attorney fees award under 5 U.S.C. § 7701(g). The arbitrator is required to provide a fully articulated, reasoned decision granting or denying attorney fees.⁸ The decision must contain an independent and specific analysis of each statutory requirement including whether: (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 are reasonable; and (4) the fees were incurred by the employee.⁹

The D.C. Court of Appeals has accepted the *Allen v. U.S. Postal Service*¹⁰ “not exhaustive, but illustrative” list of examples that aid in determining whether an award of fees is warranted in the interest of justice.¹¹ Attorney fees may be awarded in the interest of justice where: (1) the agency engaged in a prohibited personnel practice; (2) the agency’s actions are clearly without merit or wholly unfounded, or the employee is substantially innocent of charges brought by the agency; (3) the agency’s actions are taken in bad faith; (4) the agency committed gross procedural error; or (5) the agency knew or should have known that it would not prevail on the merits when it brought the proceeding.¹²

Here, there is no reference in the Award to these established standards indicating the basis for denying attorney fees. There is only a single sentence denying attorney fees to both parties, upon which the Board cannot make a determination of whether the Arbitrator employed the Federal Back Pay Act and the Section 7701(g) standards. Under these limited circumstances, the Board finds the resulting Award, with respect to attorney fees, contrary to law and public policy.

However, the Board will not speculate on the outcome of a request for attorney fees had the Arbitrator accepted a petition and used the appropriate standard. Therefore, the arbitration review request in respect to the attorney fees is granted and this matter is remanded so that the parties may submit an attorney fees request to the Arbitrator, and the Arbitrator shall determine whether attorney fees should be awarded under the requirements of the Federal Back Pay Act and Section 7701(g).

VI. Conclusion

Under these limited circumstances, the Board accepts AFGE’s arguments and finds cause to remand the arbitration award, with instruction to the arbitrator to issue findings on attorney fees consistent with this award. Accordingly, AFGE’s request is granted.

⁷ *Id.*

⁸ *Int’l Bhd. Police Ofc’s, Local 445 ex rel. Nelson v. D.C. Dept. of Admin. Serv.*, 41 D.C. Reg.1597, Slip Op. No. 300 at n.6, PERB Case No. 91-A-05 (1994).

⁹ *Id.*

¹⁰ 2 MSPB 582, 2 M.S.P.R. 420 (1980).

¹¹ *Surgent v. District of Columbia* at 495.

¹² *Id.*

ORDER

IT IS HEREBY ORDERED THAT:

1. AFGE's Arbitration Review Request is hereby granted.
2. The Arbitrator shall issue findings consistent with this Decision and Order.
3. Pursuant to Board Rule 559, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy and Board Members Mary Anne Gibbons, Ann Hoffman, Barbara Somson, and Douglas Warshof.

Washington, D.C.

January 17, 2019

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 18-A-18, Op. No. 1697 was sent by File and ServeXpress to the following parties on this the 25nd day of January 2019.

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