

**American Federation of Government Employees, Local 1923 and
Department of Defense, Navy, Indian Head Division, Naval Surface Warfare
Center**

100 FLRR 2-1082

February 1, 2000

Appealed (O-AR-3285)

THE UNION WAS ENTITLED TO ATTORNEY FEES REGARDING A GRIEVANCE ALLEGING THE AGENCY DID NOT PROVIDE THE GRIEVANT A TIMELY WITHIN GRADE INCREASE.

The issue at arbitration was whether the union was entitled to reasonable attorney fees for a grievance in which the agency agreed it did not provide the grievant a timely within grade increase. The agency also agreed to provide back pay with interest to the grievant. The arbitrator concluded that payment of attorney fees was due the union because withholding of the grievant's within grade increase and interest on his retroactive back pay constituted an unjustified and unwarranted personnel action. The union and the grievant were the prevailing party and in pursuing the grievance attorney fees were incurred. Also, agency payment of the attorney fees was within the interests of justice and met all relevant statutory criteria. Finally, the arbitrator determined that the services of a paralegal in connection with the grievance were allowable as attorney fees.

Arbitrator: Hugh D. Jascourt

DECISION AND AWARD

Hugh D. Jascourt

APPEARANCES:

On behalf of the Indian Head Division, Naval Surface Warfare Center:

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Department of Navy
Office of Counsel
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Mari Yonkers
Labor Relations Officer Department of the Navy

Naval Surface Warfare Center,
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On behalf of American Federation of Government Employees Local 1923:

William Milton, Jr.
Director Representation & Education

Michael J. Snider, Esq.
AFGE Local 1923

This is an arbitration pursuant to the collective bargaining agreement between American Federation of Government Employees Local 1923, AFL-CIO (Union) and the Indian Head Division, Naval Surface Warfare Center (Agency). Arbitrator Hugh D. Jascourt was selected by the parties pursuant to his membership on the parties' Regular Arbitration Panel. A hearing was held December 14, 1999 on the premises of the Agency. At the hearing, each party was afforded an opportunity to present witnesses and evidence, and to examine and cross-examine witnesses. The hearing the Agency submitted on exhibit and the parties submitted ten joint exhibits which were admitted into evidence. The parties declined to make closing arguments and instead timely filed post hearing briefs received by the Arbitrator on January, 24, 2000. The award in this matter is due no later than February 28, 2000.

The Issues

The parties agreed to the following issue (Tr. p. 10):

Is the Union entitled to reasonable attorney fees for its pursuit of the grievance, of Christopher Carter, in which the Agency agrees it did not provide grievant with A timely within-grade increase (WIGI) and has agreed to provide back pay with interest to the Grievant?

Implicit in this issue is a second issue (Tr. pp.20-21):

Even if the Union is entitled to reasonable attorney fees, do any of the services provide by William P. Milton, Jr. constitute paralegal services for which the Agency is liable?

Background of the Grievance

Grievant approached management about his WIGI "well in advance of June, 1999" (Tr. p.56). In July 1999, Mr. Milton in his capacity as Director of Representation and Education for the Union was approached by Christopher Carter, who complained that he had not timely received his WIGI. However, the Grievant said he did not yet want to file a grievance as he wanted to give his

supervisor more time (Tr. p. 145-146). The Grievant returned at a later time claiming that his supervisor told him to go to the Union and told him "I think that's the only way you're going to get your within-grade increase" (Tr. p.147). The Supervisor confirmed this to Mr. Milton, saying he had raised the issue with the Agency prior to June 1999, that he did every thing in his power to see that Grievant received his WIGI, and "I can't do any more" (Tr. pp. 147-148).

On September 13, 1999, the Union filed a Step 1 grievance signed by the Union attorney which requested the following relief on the basis of violations of Articles 1, 4, 12 (within-grade increases) and 13 of the parties' collective bargaining agreement among other things (Jt. Ex. 1):

1. A declaratory award finding that the Agency violated the MASTER AGREEMENT and/ applicable provisions of law, rule, regulation, and instructions;
- 2 . An order directing the Agency to retroactively effectuate the Grievant's within-grade increase;
3. An order directing the Agency to "make-whole" the Grievant for all monies owed as a result of their violative conduct, including interest;
4. Issuance of a cease and desist order from future similar or like violative conduct;
5. An order directing the Agency to pay reasonable attorney fees; and
6. Any and all other relief deemed necessary and appropriate by the Grievant, Union, or Arbitrator.

After the parties met on September 20, 1999, the Agency sent the Union a Step 1 response, dated September 29, 1999, which viewed the matter closed on the basis of a September 29, 1999 letters of apology to the Grievant from Shirley B. Scott, the Agency's Human Resources Director and Vicki D. Hanbury of Navy's Capital Human Resources Service Center (HRSC), and a Form SF-50 setting June 6, 1999 as the effective date of Grievant's WIGI (Jt. Exhibits 2, 2A, 213, 2Q).

The Union's attorney filed a Step 2 grievance dated October 5, 1999, again setting forth the same relief as requested at Step 1 on the basis that the relief requested, including interest and attorney fees, had not been met (R. Ex.3, Tr. pp. 108-109, 177-179). The Agency asked for an extension of time for the Step 2 meeting, and when the parties met on October 19, the Grievant had yet to receive anything (Tr. pp. 112-113, R. Ex.4).

The Grievant did receive payment by November 2, 1999 but without an), means by which to identify the portion designated for back pay or for interest, thereby

precluding any means by which to verify the accuracy of the payment (Tr. pp. 114-115). Also on November 2, 1999, the Agency made a Step 2 response indicating the WIGI had been effected, that the Agency is now ready to compute his interest having been delayed by an overpayment to Grievant, and denying attorney fees "absent a showing of statutory entitlement" (Jt. Ex.5). Attach was an SF-50 showing an approval dated October 22, 1999 (subsequent to the Step 2 meeting) (A. Ex.5A).

The Union attorney filed a Step 3 grievance, dated November 5, 1999, asking for the same relief as previously requested with the exception of retroactively effectuating the WIGI (Jt. Ex.6). At the Step 3 meeting held on November 12, 1999, Myron Greenhow, a Union Vice President, asked for documentation of the payments to determine the accuracy of the payment and of the interest computation, but never received it (Tr. p.117). He adds that to the date of the arbitration hearing he had yet to receive information to verify whether interest has been paid or the accuracy of payments (Tr. pp.116-117). Mari Yonkers, the Agency's Labor Relations Officer, did have a document, with the same format as Agency Exhibit I which shows a breakdown of the interest payment of \$7.72, but never supplied it to the Union (Tr. pp. 182, 185, 188, 212). Ms. Yonkers stated to the Union at the meeting that because of the unwarranted personnel action she believed the Union had met the threshold requirement for entitlement to attorney fees (Tr. p.42).

The Agency's Step 3 response was dated November 22, 1999, and was signed by Commander S.C. Shoen, although Ms. Yonkers wrote the entirety of the response (Tr. pp.65, 95, 96, R. Ex.7). The Response indicated that the parties agreed the only outstanding issue was the payment of attorney fees and paralegal fees. At the hearing, Ms. Yonkers stated she did not know that the "Agency had ever denied ' interest" since there is "an automatic entitlement to interest" (Tr. p.69). The Response states that the fees requested are unreasonable, but the Agency had yet to receive the records substantiating the fees. The Response concludes that in any event such fees are not in the interest of Justice. In this regard, it is important that Ms. Yonkers states she can deny fees, but can only recommend approval of them (Tr. p.89). Also she states she is not familiar with the legal guidelines regarding "interest of justice" and could not explain what she meant when she denied the fees on that basis (Tr. pp.94-95).

With respect to the Union supplying the Agency with records of its services, it does not do so until the Agency has agreed to pay reasonable fees (Tr. p.173-174).

In addition, the Response also asserted that Agency had underway, even before the grievance was filed, efforts to effectuate the WIGI and "notwithstanding Agency efforts, it took approximately 5 months to make the necessary corrections."

The Union invoked arbitration by letter dated November 23, 1999 (R. Ex.8A).

Relevant Statutory Authority

By Section 702 of the Federal Service Labor Management Relations Act, the Back Pay Act, 5 U.S.C.5596(b) was amended to reach in pertinent part:

(b) (1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, 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 a pay, allowances, or differentials of the employee

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect -

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally

would have earned or received during a period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title ... shall be awarded in accordance with standards established under section 7701(g) of this title; and ...

(2) (A) An amount payable under paragraph (1) (A) (i) of this subsection shall

be payable with interest.

(3) For the purposes of this subsection."personnel action" includes the omission or failure to take an action or confer a benefit.

The Positions of the Parties

The Union

The Union maintains that the Agency should be estopped from claiming the inapplicability of attorney fees because Ms. Yonkers admitted at the Step 3 of the grievance procedure that the Union was entitled to attorney fees (tr. p.43).

In any event, the Union has met the requisite elements under the Back Pay Act 5 U.S.C. 5596 which specifically provides for reasonable attorney fees related to the correction of an unjustified or unwarranted personnel action subject to the standards of 5 U.S.C. 7701(g). In this case, it is undisputed that the Agency unjustifiably withheld Grievant's WIGI and that the Union had to file a grievance to obtain it. The Agency admitted that the grievance sped up the process. As a result, the Grievant received back pay and interest (although it is not clear whether the interest is accurate).

In addition, even if Grievant received only a nominal recovery, the Union is still considered a prevailing party. An award of attorney fees to the Union is "in the interest of justice" because "the Agency's actions in failing to timely effectuate the Grievant's WIGI and interest were groundless, gross procedural error, requiring the filing of a Grievance to force the Agency to accomplish what it knew it should have done on its own" (Union Brief p. 14). This meets four of the five examples of the interest of justice standard as set forth in *Allen v. U.S. Postal Service*, 2 MSPB 582 (1980). An additional example provided in *Department of Defense Dependent Schools and Federal Education Association*, 54 FLRA 773 (1998) (hereinafter DODDS) is "where there is a service rendered to the Federal work force or there is a benefit derived from maintaining the actions." Future employees will be served well if the Agency learns that untimely processing of personnel actions will not be tolerated and will be successfully litigated by the Union.

Further factors in this case are the frequent failure of the Agency to act until the Union files a grievance and that supervisors have directed their employees to go the Union to file grievances in order to move things along because they (the supervisors) have had difficulties getting their personnel actions effectuated (citing Tr. pp.156-157).

The Agency

Arbitrators must consider any relevant law, rule, or regulation when fashioning a grievance award in the Federal sector. By the terms of 5 C.F.R.550.807 any request for payment of reasonable attorney fees related to an unjustified or unwarranted personnel action 'may be presented only to the appropriate authority that corrected or directed the corrections of the unjustified or unwarranted personnel actions." The Agency, itself, as shown by Exhibits 2, 5, and 7 (Tr. p.34-40), directed the correction of the Grievant's WIGI prior to the Union's invocation of arbitration. Because the Agency, not the Arbitrator, directed the effectuation of the WIGI, the Agency, as the appropriate authority, determined pursuant to 5 C.F.R.550.807(d) that attorney fees are not warranted. The Agency's determination under 5 C.F.R.550.807(g) is not subject to review or appeal except if provided for by statute or regulation. Consequently, the Arbitrator is without statutory or regulatory authority to award attorney fees.

The Agency further argues that even if the Arbitrator is not ousted from jurisdiction, the Arbitrator cannot award attorney fees because such an award, by virtue of the Back Pay Act, must be "in conjunction with an award of back pay to the grievant or the correction of the personnel action." Since the issue of back pay and interest was not before the Arbitrator because it was resolved by the Agency prior to the Union's invocation of arbitration, the Arbitrator lacks the statutory prerequisite to award attorney fees. The FLRA support of this preposition is shown by its decisions in AFGE Local 4015 and Norfolk Naval Shipyard , 52 FLRA 82 (1996), DODDS, supra, and DODRE, New Cumberland vs. AFGE Local 2004, 51 FLRA 15 5 (1995).

"Assuming arguendo that the arbitrator is an appropriate authority to hear the Union's request for payment of attorneys fees and has the authority to make an award of back pay in the instant case, an award of attorneys fees is not warranted because the Union has failed to demonstrate that such an award would be in the 'interest of justice... (Agency Brief p. 11). The MSPB in AIIIM supra, gave five examples of situations which met the interest of justice standard which is the prerequisite to an award of attorney fees. The FLRA in Naval Air Development Center and AFGE Local 1928, 21 FLRA 131, 137-139 (1986) (NACD) adopted Allen's guidance although it provided six examples. The Union appears to argue in Allen terms only a "gross procedural error" or that the "unintentional administrative error by the Agency as well as the 5 month administrative process undertaken to correct the error", in NADC terms "treated the action to an unconscionable degree" (Agency Brief p. 14).

The factual record demonstrates that such a claim is utterly without merit. The Agency upon discovery of the problem not only admitted its error but began to take steps to rectify the situation. As shown by Joint Exhibit 5B, the Agency was assiduous in its efforts to effectuate the WIGI, but the delay was attributable to HRSC - "a process outside the direct control of the Warfare Center" (Agency Brief p. 15). In fact, the resolution of Grievant's problem through the negotiated grievance procedure was "a good example" of the intent of Article 9 of the parties' agreement which calls for a "mutually acceptable method for the prompt and equitable settlement of grievances. . ." (Agency Brief pp. 15-16). The undisputed record does not support a determination of bad faith, unconscionable conduct, ill will, reckless disregard or gross procedural error normally required to give rise to an interest of justice determination. In any event, attorney fees should not become the ordinary practice in cases that the employee wins. *Dunn v. Department of Veterans Affairs*, 98 F.3d 1308, 1313 (Fed. Cir. 1996).

Finally, should attorney fees be found to be warranted, the Agency is entitled to an opportunity to respond to the Union's request for payment, noting that the Union has never presented the Agency with an attorney fee petition.

Discussion and Analysis

1 . Estoppel

The Union argues at the hearing that Ms. Yonkers conceded at the Step 3 of the grievance procedure that the Union was entitled to attorney fees and, therefore, the Agency is precluded from now arguing attorney fees are unwarranted. The Agency agreed that Ms. Yonkers did make such a statement but disagreed that the Agency was bound by her statement (Tr. pp.43, 55). Although this issue appears to not have been argued by the Union in its brief and the Agency appears to have ignored it in its brief, the Arbitrator feels compelled to address the issue.

The Union has provided no support for its right to rely on Ms. Yonkers statement or that it did rely on her statement to its detriment. In fact, the Union stated its practice is not to supply to the Agency the paperwork justifying its request to pay attorney fees until there is agreement by the Agency to pay attorney fees (Tr. pp.173-174). It is undisputed that the Union never presented to the Agency such paperwork. Consequently, there is no basis upon which to believe that the Union perceived that Agency had agreed to pay attorney fees. Therefore, Ms. Yonkers' statement cannot be used to foreclose the Agency's argument that attorney fees are not warranted in this case.

2. Non-Arbitrability

The Agency claims that the Arbitrator is foreclosed from determining the applicability of attorney fees because the Agency, not the Arbitrator, is the only one empowered to make such a determination. The Agency further contends that because no issue of back pay is before the Arbitrator, he is without authority to award attorney fees.

The Agency has never used the words that the issue of attorney fees is "not arbitrable." However, a claim that the Arbitrator is without jurisdiction to determine the applicability of attorney fees is no different than a claim of non-arbitrability. Only in its alternative arguments does the Agency claim that the Arbitrator should uphold its determination that attorney fees are not warranted in this case.

The Agency prior to the Arbitration hearing never raised the issue of non-arbitrability. The same is true at the hearing, although it did refer to a belief that attorney fees were not appropriate because of the stage which the grievance was "settled" (Tr. p.28). This statement was uttered only after the Agency declined to give an opening statement and tried to avoid providing any rationale for its position(Tr.p.18-23,27-28). Instead the Agency wanted to state its position only in its post-hearing- brief (Tr. p.27). Consequently, the Union has not argues in its brief that first prong of the Agency's argument and has not addressed the second prong in terms of non-arbitrability.

The Agency's deliberate avoidance of articulating its argument of non-arbitrability should preclude the Agency from raising such arguments after the hearing when they could not be addressed by the Union. In addition, the parties' collective bargaining agreement precludes it. Article 9, Section 4a of that agreement provides:

The Employer agrees to raise any questions of grievability or arbitrability of a grievance no later than the Step 3 decision.

Section 4b of the same article provides that the party raising the grievability/arbitrability question will provide an explanation of the issue by the time an arbitrator is selected from the permanent panel. The Employer met neither of these conditions, doing so only in its post-hearing brief.

The Arbitrator, therefore, views these issues on non-arbitrability to be foreclosed or waived. Nevertheless, because these issues will undoubtedly arise again, the Arbitrator will address them.

a.) The Agency as the sole authority to rule on attorney fees

The Agency states that it directed the correction of the Grievant's WIGI prior to the Union's invocation of arbitration. It relies on 5 C.F.R.550.807 that payment of reasonable fees related to an unjustified or unwarranted personnel action "may be presented only to the appropriate authority that corrected or directed the correction-of the in personnel action." The Agency viewing itself as the appropriate authority pursuant to 5 C.F.R.550.807(d) determined that attorney fees are not warranted. The Agency states its decision by 807(g) is not subject to review or appeal except if provided for by statute or regulation.

As for review or appeal, the FLMRS provides in Section 712 1 (c) five categories not subject to a grievance. Appeal of such an Agency determination is not one of them. The parties' agreement does not exclude the Agency's determination. Since both Article 9 Section 3 of the agreement and Section 7121 make the negotiated grievance procedure exclusive, the grievance procedure meets the requirements of 807(g). Article 9 of the parties' agreement by its own terms applies to claimed violations of the FSLMRS and, therefore, to Section 702 of that Act, which pertains to attorney fees.

If the arbitrator finds that regulations relied upon by the Agency do not preclude the Union from contesting the Agency's determination of the applicability of attorney fees. The Agency's argument that it can interpose itself as the sole unchallengeable judge of a union's claim of attorney fees, if valid would greatly undermine the very system that the statute was created for - the parties, rather than the Agency, bilaterally establishing mechanisms to resolved their disputes. To make the Agency the sole determiner of whether attorney fees related to a

grievance over an unjustified or unwarranted personnel action is in the interest of justice violates the spirit of the Act.

An example of this is that Ms. Yonkers wrote verbatim the Step 1 determination that the Union did not meet the interest of justice standard to warrant attorney fees (Tr.pp.95-96). And yet she testified she was not familiar with the legal standards to determine what is or is not in the interest of justice (Tr.p.94). She could not even explain what she meant by her finding that the Union's request was not in the interest of justice (Tr.pp.80-83),95). And yet the Agency claims that her determination should not be subject to review!

Even using the hypertechnical approach of the Agency, the regulations relied upon the Agency do not situate the Agency to make a determination on attorney fees as "the appropriate authority." This is because 550.801 provides that such authority has to make an administrative determination. That determination is defined by 550.804 as having been met "when an appropriate authority determines, in writing that an employee has been affected by an unjustified or unwarranted personnel action (emphasis supplied)." The Agency never made such a determination in writing. Joint Exhibit 7 refers to what occurred as an "administrative error." The Agency's admission that the occurrences in issue constituted an unjustified or unwarranted personnel action never occurred until the hearing. Thus, the Agency. could not award attorney fees. Since, it took the arbitration proceeding to wrench this obvious confession from the Agency, the Arbitrator by virtue of 550.803 because the appropriate authority.

The Arbitrator, therefore, has jurisdiction to determine whether attorney fees are warranted.

b.) The Arbitrator cannot award attorney fees because the issue before him does not

involve his making an award of back pay.

The Agency relies on AFGE Local 4015, supra. It has no relevance to the instant case. There is nothing which states that the back pay had to emanate from the Arbitrator as distinguished from the grievance procedure. In that case the FLRA upheld the Arbitrator's determination that attorney fees should not be paid because he did not award back pay. The reason he did not award back pay was that he awarded grievants priority consideration for disputed positions. There was no requirement upon the Agency to appoint them to a position.. As the FLRA phrased it, the possibility that implementation of the award could result in a future benefit cannot be the basis for back pay.

DODDS, supra, is relevant. It also relies on New Cumberland, supra.

In DODDS, the Agency claimed that Arbitrator E. William Hockenberry could not award attorney fees because he did not award back pay and, in fact, Arbitrator Hockenberry did not find the Agency had engaged in an unjustified or unwarranted personnel action. Instead, Arbitrator Hockenberry was seeking to enforce the award of Arbitrator Richard Bloch. The Agency had made the underlying determination that back pay was owed. Arbitrator Bloch found that the Agency had violated the parties' collective bargaining agreement because the grievants "suffer[ed] delay, sometimes extensive, in payment of monies unquestionably due them. He found also the Back Pay Act applied and that Grievants were due interest. Arbitrator Hockenberry enforced the payment of interest and awarded attorney fees.

The Agency argued that it did not contest the grievants' entitlement to interest and that the reason why the grievants were not paid interest initially "was because of the confusing and conflicting practices of government agencies in setting (the dates from which interest should be paid)..... The FLRA did not require Arbitrator Hockenberry to go back and redetermine the underlying basis, It found that there was a continuum between the awards of the two arbitrators.

In short, the FLRA upheld Arbitrator's award of attorney fees even though he did not rule on the underlying merits.

There is no precedent for precluding an Arbitrator from finding that attorney fees are warranted in a grievance in which the underlying entitlement to back pay had already been resolved, particularly where during the processing of the grievance attorney fees had been sought by the Union as relief. In fact, as pointed out above, prior to the arbitration hearing, the Agency had never admitted that it had engaged in an unjustified or unwarranted personnel action. The Agency has yet to concede it violated the collective bargaining agreement. In fact, in its merits argument the Agency views delays of five months were "prompt" resolution and, in any event, was not of their own making. These involve factual determinations which go to whether the standard of "interest of justice" has been met.

The Agency's argument that its efforts to resolve the grievance and to take corrective action show that it would not be in the interest of justice to award attorney fees are discussed below in determining the merits arguments, as distinguished from whether the Arbitrator is precluded from determining the merits.

In summary, the Agency has produced no basis to preclude the Union from seeking a determination that attorney fees are warranted to compensate it for its pursuit of the grievance. The Agency cannot block the Union from seeking such relief solely by finally meeting its obligation to the employee prior to the invocation of arbitration. SSA and AFGE Local 1923, 48FLRA1040 (1993) supports this in its declaration that if the underlying case meets the interest of

justice criteria to warrant attorney fees then that judgment applies to all subsequent phases of the litigation if the grievant prevails in those stages.

3. The parties both agree that in order to meet the interest of justice standard, one of the five Allen examples pertaining to fees must be met.

That fees were incurred for the services of an attorney and that the Union/ grievant was the prevailing party are beyond dispute. The fact that Allen must be met - or in the words of the statute awards of attorney fees must be in accordance with standards established under 5 U.S.C. 7701(g) - reveals that there must be something more than an award of back pay for the underlying matters. As the Agency points out DUNN, supra, instructs that attorney fees should not become the ordinary practices in cases the employee wins. The Union claims it has met four of the Allen factors when it needs to meet only one. The Agency contends that Union has met none of the Allen factors and, therefore, the Union's claim should be denied.

a) Where the Agency has engaged in a prohibited personnel practice, as defined under 5 U.S.C. 2302(b)

The Union states that the Agency by failing to take an action it should have and when the Agency had a clear obligation under law to do so, the Agency committed a prohibited personnel action. The Agency did not specifically address this contention.

In this case the failure to timely process Grievant's WIGI is the subject of the grievance. The Agency never contested Grievant's eligibility for the WIGI. It never contested his right to retroactive back pay. It never contested Grievant's right to interest. Of course, the Agency never explained why it failed to meet its obligations. The Agency denied all other forms of relief requested by the Union. The Union has presented no precedent showing that the Agency's failure or conduct translates into a prohibited personnel practice. The fact that the Agency's actions trigger back pay obligations do not per se become prohibited personnel actions. Otherwise all matters triggering back pay would become prohibited personnel actions. Although the Agency did violate Article 12, Section 6, the Arbitrator is loathe to justify the payment of attorney fees solely on the fact that there was a contractual violation, under the circumstances of this case, as a prohibited personnel practice.

b) Where the Agency's action was clearly without merit

The Union argues that Ms. Yonkers admitted that the Agency's action was clearly without merit and that "no reason was ever given for the extremely lengthy delay taken for the effectuation of an extremely simple and common personnel action" (Union Brief p. 15).

The Agency does not address the matter of the payment of interest. Its argument as it applies to the WIGI is addressed under subparagraph (c).

Ms. Yonkers did admit that there is "an automatic entitlement to interest" (Tr. p.69). Nevertheless, at Step I the Agency did not authorize the payment of interest and pronounced, the case as closed (Jt.Ex.2). It was not until the Step 2 response over a month later that the Agency said it was ready to compute interest (Jt.Ex.5). Nevertheless, neither the Grievant nor the Union ever received anything to show that Grievant later did receive his interest or anything to verify that the payment was accurate (Tr.p.1 17). Since the Union on October 5, 1999 at Step 2, @vas still demanding interest and was never told before November 2, 1999 that the Agency would pay interest, the Agency must be viewed as having refused to pay something which it claims is automatic. In DODDS the Agency's actions pertaining to the accrual and payment of interest were found to violate this Allen criteria. .

In addition, this in not the first case before this Arbitrator in which the Agency failed to promptly pay interest. In an ADR preceding involving this Arbitrator the Agency failed on April 13, 1999 to pay interest on payments which had not been made since July 1998 in Case No. 98-08171 A. The Arbitrator had to issue a May 27, 1999 compliance order to bring about the payment of interest. This Arbitrator had to again issue a compliance order on June 14, 1999 because interest still had not been paid within the time period agreed to by the Agency. Payment still was not made until August 20, 1999 after a third compliance proceeding commenced.

Also on May 27, 1999, in Case No. 98-05072, the Arbitrator directed interest to be paid to a grievant if he did not receive by June 14, 1999 the back pay due to him from January 8, 1997. Because such payment was not made, the Arbitrator had to order the payment of interest. On August 21, 1999 the grievant finally received back pay, although there was still a controversy over the correct amount. and he still had yet to-receive the payment of interest.

Also in Case 98-02949, another Arbitrator had ordered on May 27, 1998 back payment of overtime. In the April ADR proceeding, the Agency agreed to finally make payment. However, the Agency did not request payment until June 16, 1999. Payment was finally made but at an incorrect rate and without interest. In Compliance Proceeding III, the Agency agreed to make suck payment by September 17, 1999.

In this context, the failure of the Agency to identify interest in its Step I response cannot be viewed as an oversight and must be viewed as intentional.

Accordingly, the Agency's treatment of interest payments in this case must be viewed as meeting this Allen criterion, thereby entitling the Union to payment of attorney fees'

c) Where the Agency committed gross procedural error which prolonged the proceeding

The Agency views the following example in NADC, supra, to also be applicable to this criterion: instances where the Agency's ill will, or negligence tainted the action to an unconscionable degree. This may be inferred from Agency inaction throughout the proceeding.

In view of the fact, that the "clearly without merit" standard has been met, this factor is superfluous. Nevertheless, because this goes so much to the heart of the matter, the Arbitrator is addressing this criterion.

The Union points to the prolonged period of time to effectuate the WIGI for a ministerial act which the Grievant's supervisor had approved and the Agency's admission that payment would have been further delayed had it not been for the grievance (Tr.p.71-72). The Arbitrator notes that the Union and Grievant waited several months before filing a grievance and only after the supervisor directed the Grievant back to this Union saying to the Union "I've done everything in my power to see that he got his within-grade increase" (Tr. pp. 147-148). The Union adds to this a litany of similar conduct leading to the belief "they don't do anything until we file a grievance" (Tr. pp. 1 50-157).

The Agency's response is distressing. It characterizes what occurred as an unintentional administrative error which the Agency admitted and took steps to rectify. The Agency views what it did as prompt and that delay was due to HRSC which was outside the direct control of the Agency.

For substantiation of its position, the Agency relies primarily upon Joint Exhibit 5B, which was an enclosure to its Step 2 response and denotes over the course of three pages from a time prior to May 27, 1999 where it was aware that Grievant's WIGI was to be effective on June 6, 1999 and concluding on October 19, 1999. These "notes" were not verified by any witness. They did not even purport to be copies of the Agency's records. In fact, the Agency produced no witnesses, thereby avoiding cross-examination. The Agency kept insisting at the hearing there was no factual dispute (Tr.pp.21, 28, 52-53).

It is remarkable that the Agency, which takes an over legalistic approach, uses this document as evidence when there was no admission by the Union of the veracity of its contents. It cannot even qualify as hearsay evidence. Its only use is as an admission against interest.

It is also remark-able that the Agency is using the defense of someone else was responsible when the Arbitrator in Compliance Proceeding III (see p. 12 of the award) had directed the Agency to produce records of what it had done in other matters but the Agency did not do so. At that time the Arbitrator had had to deal

with a very large number of personnel actions or payments which repeatedly failed to be achieved or which were done incorrectly. The Arbitrator had privately speculated to himself that either the Agency or its servicing agencies were so understaffed that repetition of such situations kept reoccurring. The Arbitrator had hoped revealing such problems could lead to both tolerance by the Union as well as efforts by the Union to help the Agency or its servicing agencies obtain added resources. The other side of the coin was the possibility that bargaining unit members (perhaps due to the activism of the Union) were receiving lesser or delayed treatment when compared to personnel actions or payments to others. The Agency cannot come in now and claim it is not its fault despite assiduous efforts on its part when the Agency refuses to produce testimony or documentation to substantiate its position. In fact, there is nothing to disprove in this case the reason why HRSC was "slow" was because of gross negligence of the Agency if not intended disparately unfavorable treatment of Grievant.

Obviously, the Arbitrator cannot impute such motivations or reasons to the Agency. At the same time, he cannot allow the Agency to avoid being depicted as negligent or as having engaged in gross procedural error. What the Arbitrator can do is to take note of a continual pattern by the Agency shown in the April ADR proceeding and in Compliance Proceedings I through V since then. In that last proceeding, Joyce Wilson was to have been given a retroactive promotion to May 13, 1999 as a result of the April ADR proceeding but had yet to receive it by late December 1999. As was found in some of the other matters in issue actions of Agency officials precluded directives of this Arbitrator or actions agreed to by the Agency. In the case of Ms. Wilson, the Arbitrator found evidence had been withheld which would have resulted in promotion in January 1998. In other cases, frequently when compliance did occur, it occurred only a day or so before hearing dates.

It is in this context that the Arbitrator cannot believe, in the absence of evidence and testimony which is subject to cross-examination or rebuttal, that Grievant's WIGI just "fell between the cracks." Moreover, the Agency relied on DODDS, supra, in its brief. In the underlying determination of Arbitrator Bloch, the Arbitrator cited as an example of the conduct which led to attorney fees the fact that Karen Sellars' paperwork was not forwarded to Army finance until February 1993 and she was not paid until July 1993. This is not dissimilar from the five-month period during which Grievant was not given his WIGI and which involved lesser analysis by the Agency to achieve. The defense argued by the Agency to the FLRA in DODDS was equally unconvincing, -: that the grievants were not paid interest initially because of the confusing and conflicting practices of government agencies in setting the dates from which interest should be paid. The circumstances in the instant case surely exemplify the standard in NACD, as identified by the Agency, of negligence and inaction tainting the inactions of the Agency to an unconscionable degree.

Therefore, based on the foregoing, including careful examination of all the evidence and arguments of the parties, the Arbitrator finds that payment of attorney fees is due the Union because withholding of Grievant's WIGI and interest on his retroactive back pay constituted an unjustified and unwarranted personnel action, because the Union/ grievant was the prevailing party and attorney fees were incurred in doing so, and because the payment of attorney fees is in the interest of justice and meets all relevant statutory criteria. Because the Union has had to incur attorney fees, to obtain attorney fees, the award of attorney fees encompasses those efforts as well. SSA and AFGE Local 1921. 48 FLRA 1040 (1993).

4. Agency opportunity to respond to any substantive for payment produced by the Union.

The Agency obviously has this right to ensure that the monetary claims made by the Union are legitimate.

5. Were the services of William P. Milton, Jr. those of a paralegal which the Agency has the obligation to pay in conjunction with its duty to pay attorney fees to the Union?

The Agency cross-examined Mr. Milton at great length (Tr. pp. 184-212). The Agency stated it would brief its objections to Mr. Milton's status as a paralegal (Tr.p.229). Nevertheless, the Agency did not brief this issue. Instead ' it stated in its brief that " . . . it has determined", in the absence of a Union fee petition detailing exactly what roles and responsibilities were assigned to Mr. Milton, that such a response "is premature under the provisions of 5 C.F.R.550.807(b)." That provision simply states that the appropriate authority to whom the request is presented shall provide an opportunity for the employing agency to respond to a request for the payment of reasonable attorney fees.

If Mr. Milton does not qualify as a paralegal, it would not matter what the Union submits. If he does so qualify, the Agency's examination of the "fee petition" does not afford the Agency to re-raise the issue of whether Mr. Milton is a paralegal. Therefore, it is critical to determine whether Mr. Milton is a paralegal.

The first aspect is Mr. Milton's qualifications. He has had 19 years of experience in Federal Service labor relations during which he served as the representative in 125 arbitration cases and filed hundreds of briefs (Tr.pp.121 et.seq.). When he worked for the National Treasury Employee Union he did the same work as attorneys and reported to the Assistant General Counsel (Tr.pp.131-132). Since working with Local 1923 he has lost only two of 76 arbitration cases with the Naval Surface Warfare Center (Tr.p. 138). He has not received any training entitled " paralegal"(Tr.p.188). Mr. Milton has appeared before this Arbitrator in a number of cases involving a number of agencies. Mr. Milton's skill in presenting cases, examination and cross-examination and articulating his position and his

knowledge and understanding of Federal Service and of arbitration processes surpasses that of many of the advocates who have appeared before this Arbitrator.

As for Mr. Milton's role, the Union's attorney is involved only in cases involving back pay and unwarranted personnel actions (Tr.p.204). Mr. Milton at the attorney's direction engages in research, prepping witness and drafting grievances for the attorney's approval (Tr.pp.143-195). Where the potential problem occurs is that Mr. Milton is also Director of Representation and Education for AFGE Local 1923 (which also represents units at other than the Agency) (Tr.pp.126, 190-191).

The Back Pay Act authorizes attorney fees to be paid also for the services of law clerks, paralegals, or law students when assisting members of the Bar, 5 C.F.R. 550.807(f). In Calvin A. Shirnotsoka v. U.S. Postal Service, 78 MSPR 679 (1998), the MSPB allowed attorney fees to be paid to a legal investigator who conducted interviews with certain witnesses, located other witnesses, photographed evidence and assisted in various aspects of case preparation. The rationale for allowing charges for non-attorneys in fee awards is that they provide necessary services which would be more costly if they were performed by attorneys Federal Deposit Insurance Co1porations v. NTEU, 53 FLRA 1657 (1998). In addition, the EEOC in Deborah Finch v. U.S. Postal Service, 87 FEOR 23051 (1987) instructs "that the definition of who is a paralegal is and not restricted to those who attend legal courses or who complete a formal program in this area." The EEOC notes that even the America Bar Association has never required that any type of educational training be required to be considered as a paralegal.

Therefore, the only requirements are that there be an attorney-client relationship with the Grievant and that the paralegal performed services under the supervision of, and as an agent for, the attorney, FDIC, supra.

The records shows that Mr. Milton meets the requirements of a paralegal and, therefore, those services which he performed under the direction or for the Union's attorney are allowable as attorney fees, notwithstanding his role as a paid professional on behalf of the Union. The fact that there is a controversy borders on the absurd because if the Union attorney had to engage in the tasks performed by Mr. Milton, the Agency would have a greater monetary obligation since the market rate for attorneys is often at least twice that of the market rate for paralegals.

AWARD

Based on the foregoing including a careful reading of all the cases and authorities cited by the parties - even if not referenced above, the Arbitrator orders that:

1. The Agency shall pay all reasonable attorney and paralegal fees incurred in the processing of the grievance of Christopher Carter and in the obtaining of attorney fees related thereto.
2. The Agency's review of the documentation supplied by the Union to the Agency to substantiate such attorney fees shall not exceed ten business days after the date of the Agency's receipt of such documentation, unless the parties mutually agree to an extension of time.
3. Payment of such attorney and paralegal fees shall be made to the Union's Legal Defense Fund within 30 calendar days of the Agency's final acceptance or agreement on the sums due.
4. The Arbitrator shall retain jurisdiction over all matters involved with the implementation and effectuation of this Award.