

**Department of the Navy, Naval Surface Warfare Center, Indian Head  
Division, Indian Head, MD and AFGE, Local 1923**

Federal Labor Relations Authority

0-AR-3285; 57 FLRA No. 75; 57 FLRA 417

July 23, 2001

The Authority Found The Arbitrator Had Jurisdiction Over The Dispute And Could Award Attorney's Fees Without Awarding Back Pay Where The Agency Had Already Awarded Back Pay For An Admitted Unwarranted And Unjustified Personnel Practice.

The grievant requested a within-grade step increase prior to June 1999. The grievant's supervisor informed the grievant that he would have to file a grievance to get the WIGI. The grievant filed a grievance in September 1999 seeking the WIGI retroactive to June, back pay plus interest and attorney's fees. The Agency responded by granting the WIGI as of June 6, 1999. The grievant filed a step two grievance again requesting back pay plus interest and attorney's fees. In November 1999, the grievant received a lump sum payment, but the Agency did not itemize which portion of the payment was back pay and which portion was interest. The Agency denied the request for attorney's fees. The Union filed a step three grievance requesting itemization of the lump sum payment and attorney's fees. The Agency admitted that it had engaged in an unwarranted and unjustified personnel practice when it did not automatically grant the WIGI, but denied the attorney's fees request stating that it was not in the interest of justice. The Union invoked arbitration over the question of attorney's fees. The Arbitrator determined that the untimeliness of the grievant's WIGI was an unwarranted and unjustified personnel practice and the Union was entitled to attorney's fees. The Arbitrator retained jurisdiction to consider any request for attorney's fees. The Agency excepted, arguing that the Arbitrator lacked jurisdiction because he did not award back pay, the Arbitrator was biased, the award was based on non-facts and award of fees was not in the interest of justice. The Authority found the Arbitrator did have jurisdiction to review the issue in dispute. The Authority pointed out that the Agency admitted to committing an unwarranted and unjustified personnel practice and paid the grievant back pay. The Authority quoted from its decision in DODDS, 54 FLRA 514, that "there is no requirement in our precedent or the Back Pay Act that an award of backpay be in the same proceeding as the proceeding that determines entitlement to attorney fees." The Authority also found that the Arbitrator did conduct a fair hearing and was not biased, but noted the problems the Agency and Union had in the past with cases before this same Arbitrator. The Authority then found that the award was not

based on a non-fact and the award of fees was in the interest of justice. The Authority remanded the award to the parties, absent settlement, to resubmit to the Arbitrator to determine the reasonableness of the fees sought. The Authority noted, however, that if either party objects to the original Arbitrator, then the matter should be submitted to another arbitrator.

Before: Cabaniss, Chair; Pope and Armendariz, Members

## Decision

### I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Hugh D. Jascourt filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator determined that the Agency had committed an unjustified or unwarranted personnel action when it improperly failed to award the grievant backpay with interest at step one of the grievance procedure. In addition, after reviewing the record the Arbitrator determined that attorney fees were warranted in the interest of justice. For the reasons explained below, we remand this matter to the parties for their resubmission to this Arbitrator, absent settlement, to determine what amount of attorney fees is reasonable. However, consistent with our decision in *United States Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div., Indian Head, Md.*, 56 FLRA 848 (2000) (*Indian Head*), involving these parties and similar questions raised by the Agency, if either party objects to resubmission of this matter to this Arbitrator, then the parties are directed to select a different arbitrator to determine the reasonableness of the fees sought.

### II. Background and Arbitrator's Award

Prior to June, 1999, the grievant approached his supervisor requesting a within-grade step increase (WIGI). After waiting for some time, the grievant was told by his supervisor that the supervisor had done everything in his power to see that the grievant received the WIGI and the only way the grievant would get the increase was to file a grievance.

In September, 1999, the grievant filed a step one grievance under the parties, collective bargaining agreement. The grievance sought, among other remedies, retroactivity of the step increase, backpay including interest, and reasonable attorney fees. The Agency responded with two letters of apology from human relations officers and a form SF-50 which set June 6, 1999, as the effective date of the step increase.

In October, 1999, the grievant filed a step two grievance requesting the same relief as the step one grievance. In November, 1999, the grievant received a lump sum payment but was unable to determine the amount of interest paid since no itemization was provided. In response to the step two grievance, the Agency stated that the WIGI had been "effected," that interest was being computed and that attorney fees were denied absent "a showing of statutory entitlement." Award at 3.

In November, the Union filed a step three grievance asking for the same relief as at the prior steps and requested documentation that would explain the computation of the interest. During the step three grievance meeting, the Agency's labor relations officer indicated that the Agency had engaged in an unwarranted personnel action and that the Union had met the threshold requirement for attorney fees. *Id.* In its official response, however, the Agency indicated that attorney fees were "unreasonable" and not warranted "in the interest of justice."

The parties agreed at the hearing to have the Arbitrator resolve the following issue:

Is the Union entitled to reasonable attorney fees for its pursuit of the grievance, . . . 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?<sup>2</sup>

*Id.* at 2.

In the award, the Arbitrator determined that the Agency had committed an unjustified or unwarranted personnel action when it failed to timely pay the grievant. Accordingly, after reviewing the record, the Arbitrator concluded that attorney fees were warranted in the interest of justice. In reaching this conclusion, the Arbitrator noted that the Agency failed to acknowledge that the grievant was entitled to the payment of interest until step two of the grievance process. At that point, the Arbitrator noted, the Agency failed to set forth the amount of interest it would be paying, and the Union did not receive an itemized account verifying the amount of interest paid. *Id.* at 10. Accordingly, the Arbitrator determined that attorney fees were warranted in the interest of justice because the Agency's actions in failing to pay interest at the step one grievance response was "clearly without merit."*Id.*

The Arbitrator also explained that the Agency committed "gross procedural error" by prolonging the proceeding because it initially refused to pay the grievant interest. *Id.* at 11-12. In doing so, the Arbitrator noted that in his experience with these parties, the Agency had routinely delayed making payments owed to employees.

Further, the Arbitrator determined under Article 9, Section 4(a) of the parties' agreement that, to the extent the Agency argued for the first time in its post hearing brief that the present matter was "not arbitrable," based on its interpretation of Office of Personnel Management (OPM) regulations, such argument was untimely and therefore waived.3Id. at 7. The Arbitrator also stated that even if he was to address this argument on the merits, he would not find it persuasive.

Accordingly, the Arbitrator sustained the grievance and retained jurisdiction to consider any request for attorney fees. Id. at 14.

### III. Positions of the Parties

#### 1. Agency's Exceptions

The Agency contends that the grievant's request for fees had already been definitively dealt with during the negotiated grievance procedure. It asserts that it determined that it had committed an error in untimely processing the grievant's WIGI, and that it corrected that error by paying the grievant backpay and interest. As such, it argues that under OPM regulations implementing the Back Pay Act, i.e., 5 C.F.R. §§ 550.801---808, it is the "appropriate authority" to determine the attorney fees in question.

It further contends that its determination that attorney fees were not warranted in the interest of justice is not appropriate for arbitral review, citing 5 C.F.R. § 550.807(g). Exceptions at 8-14. Accordingly, the Agency argues that the Arbitrator lacked jurisdiction to determine this matter. The Agency also argues that the Arbitrator did not award attorney fees in conjunction with an award of backpay to the grievant on correction of a personnel action. Exceptions at 15. Therefore, it again asserts that the Arbitrator lacked authority to award fees.

Moreover, the Agency argues that the Arbitrator erred by determining that fees were warranted based on facts not in evidence, the Arbitrator's bias, denial of a fair hearing, and nonfact. First, it contends that the Arbitrator erroneously relied on evidence gathered at other hearings involving these parties in finding that attorney fees were warranted in this matter. Id. at 21-22. The Agency asserts that this evidence is unreliable as it was not subject to direct or cross examination, was never entered into the record, and was first brought to light in the Arbitrator's award. Moreover, the Agency contends that without the ability to refute, rebut or clarify these "facts," it is severely prejudiced.

Second, the Agency argues that the Arbitrator made a number of statements that tend to show bias.4 Specifically, the Agency argues that the Arbitrator stated in his award that he had already speculated, in other cases involving these parties, that the Agency discriminated against Union members by its inaction and

negligence. Id. at 27. It further asserts that prior to the hearing, the Arbitrator contacted the Agency's labor relations officer who, while on the phone, told the Arbitrator she had just started to work for the Agency. At that point, the Agency asserts, the Arbitrator "offered [his] condolences." Id. at 28. Finally, the Agency contends that during a five hour discussion with the Arbitrator prior to the hearing in this matter, the Arbitrator questioned Agency counsel as to why he had filed an exception to a previous award by the Arbitrator. According to counsel, the Arbitrator stated that such actions made him look bad and insisted that counsel withdraw the exceptions. Id. at 28. The Agency argues that these circumstances show bias by the Arbitrator.

Third, the Agency contends that the Arbitrator acted improperly when he required it to make an opening statement despite its protest that such a statement was not needed as the burden of proof rested with the Union. Id. at 30. It contends that this resulted in the Arbitrator unfairly prejudicing the Agency, and, as such, a denial of a fair hearing.

Fourth, in its argument that the Arbitrator relied on facts not in evidence, the Agency also argues that the Arbitrator's award was based on "nonfacts." To this extent, the Agency argues that not only were certain facts not properly before the Arbitrator, but that other facts found by the Arbitrator were "clear misstatements of undisputed historical fact." Id. at 24. In this respect, the Agency restates its viewpoint of the facts that transpired throughout the grievance process, including the steps it took to rectify the grievant's claim. Id.

Finally, the Agency argues that the award "does not fall within the interest of justice standards articulated by the MSPB or the FLRA," and cites to a number of cases which generally describe those standards. Id. at 25.

## 2. Union's Opposition

The Union moves to strike the Agency's exceptions because the Agency failed to "provide the documentation necessary to support its exceptions," citing United States Dep't of Labor, Washington, D.C., 55 FLRA 1019 (1999) (DOL). Specifically, the Union argues that it never received the Agency's post-hearing brief in this case, despite numerous requests. Opposition at 9.

The Union next argues that to the extent the Agency claims that this matter is non-arbitrable, the Agency failed to raise this matter prior to submission of its post-hearing brief. As such, the Union argues that the collective bargaining agreement bars the Agency from raising this issue past the step three grievance decision, and that the Arbitrator already reached this conclusion in his award. Id. at 9-10. Accordingly, the Union requests that the Authority deny this exception.

Furthermore, the Union argues that the Arbitrator properly awarded fees under the Back Pay Act. It cites to United States Dep't of Defense, Dep't of Defense

Dependents Schools, 54 FLRA 773 (1998), and contends that an Arbitrator need not award backpay in order to determine that attorney fees are warranted. Instead, the Union argues that an arbitrator need only find the requisite elements have been satisfied based on a "continuum" of other decisions. Opposition at 14.

Moreover, with respect to the Agency's fair hearing, bias and nonfact arguments, the Union makes several assertions. First, it argues that the Agency is simply disagreeing with the Arbitrator's neutral assessment of the facts and his legal conclusions. Id. at 17.

Second, the Union asserts that the Arbitrator did not fail to conduct a fair hearing, did not refuse to consider pertinent and material evidence, and did not conduct the proceeding in a manner that prejudiced the Agency. Id. at 19. In this regard, it also argues that the Agency's insistence that the Arbitrator improperly required the Agency to present an opening statement was waived when it agreed to let the Arbitrator conduct the hearing as he saw fit in accordance with Article 11, Section 7(b) of the parties' agreement.

Finally, the Union questions the veracity of the Agency's affidavit submitted as evidence in support of its bias exception. Agency Exhibit 13. It claims the statement contained in the affidavit is little more than self-serving, and absent an opportunity for the Union to cross examine the declarant, should be stricken from the record. Opposition at 18.

#### IV. Analysis and Conclusions

##### A. Preliminary Matter

Our regulations require the parties to serve a complete copy of any documents filed with the Authority upon all counsel of record or other designated representatives. 5 C.F.R. § 2429.27(a). Here, the Union argues that it never received the Agency's post-hearing brief in this case, despite numerous requests, and it moves to strike the Agency's exceptions.

In addressing the Union's contention that the Agency's exceptions should be dismissed, we note that the Union's cited case, DOL, dealt with the failure of an Agency to provide a copy of a disputed contract provision to the Authority when it filed its exceptions. DOL, 55 FLRA at 1022. The instant case is distinguishable in that the Agency allegedly failed to supply a post-hearing brief to the Union during arbitration, rather than failing to provide the Authority with documentation supporting its exceptions. The Union does not assert that the Agency failed to serve it with a complete copy of its exceptions and attachments or otherwise failed to comply with any Authority regulation. Accordingly, the Authority finds that the exceptions are not procedurally defective.

##### B. The Arbitrator Had Authority to Review and Award Attorney Fees

When a party's exception challenges an arbitration award's consistency with law, rule, or regulation, the Authority reviews the questions of law raised in the exception and the arbitrator's award de novo. See NFFE, Local 1437, 53 FLRA 1703, 1709 (1998). When applying a de novo standard of review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law, based on the underlying factual findings. *Id.* at 1710. In making that assessment, the Authority defers to the arbitrator's factual findings. See NTEU, Chapter 50, 54 FLRA 250, 253 (1998).

The Agency contends that as a matter of law and regulation the Arbitrator was precluded under OPM regulation from reviewing its denial of attorney's fees. It also argues that in the absence of the Arbitrator awarding backpay, the Arbitrator was precluded from awarding attorney fees. We disagree.

With respect to the first assertion, the Agency claims that it was the appropriate authority under OPM regulations that directed the correction of an unjustified or unwarranted personnel action. It also argues that after making this determination, it denied the requested attorney fees. As such, it contends that pursuant to 5 C.F.R. § 550.807(g), "[a] determination [by an appropriate authority] concerning whether the payment of reasonable attorney fees is in the interest of justice and concerning the amount of any such payment shall be subject to review or appeal only if provided for by statute or regulation." Exceptions at 10. Accordingly, it argues that its determination is not subject to review.

There is no basis to conclude that the parties agreed to exclude the Agency's fee determination from the scope of the grievance procedure, including arbitration, under the parties' collective bargaining agreement. Moreover, this matter is not statutorily excluded under § 7121(c). Therefore, the Agency has failed to show how its fee denial is not grievable and arbitrable under § 7121. Accordingly, the Agency's exception is denied.

We also reject the second Agency argument, that the Arbitrator lacked the jurisdiction to award attorney fees because he did not specifically award backpay. As noted by the Union, an arbitrator does not need to award backpay in order to determine that attorney fees should be awarded in the interest of justice. The Authority has stated:

There is no requirement in our precedent or the Back Pay Act that an award of backpay be in the same proceeding as the proceeding that determines entitlement to attorney fees. Rather, as long as employees have, in fact, been determined to be entitled to an award of backpay under the Back Pay Act, that this award was made in advance of the proceeding at issue has no bearing on a party's entitlement to the other remedies provided for in the Back Pay Act.

United States Dep't of Defense, Dependents Schools, 54 FLRA 514, 519 (1998).

Here, the Arbitrator found that the grievant was entitled to the backpay the Agency granted because the Agency committed an unjustified or unwarranted personnel action. Based on the above precedent, such finding is sufficient to justify awarding attorney fees. Accordingly, this claim does not provide a basis for finding the award deficient.

### C. The Arbitrator Conducted a Fair Hearing

We construe the Agency's argument that the Arbitrator considered evidence that was not a part of this record as an exception that the Arbitrator did not conduct a fair hearing.<sup>5</sup> Moreover, the Agency argues that the Arbitrator was biased in determining the outcome in this matter, and impermissibly shifted the Agency's burden of proof by requiring it to make an opening statement.

An award will be found deficient on the ground that an arbitrator failed to conduct a fair hearing when it is established that an arbitrator's refusal to hear or consider pertinent and material evidence, or other actions in conducting the proceeding, prejudiced a party so as to affect the fairness of the proceeding as a whole. See *AFGE, Local 1668*, 50 FLRA 124, 126-27 (1995); *United States Dep't of the Air Force, Hill AFB, Ut.*, 39 FLRA 103, 105-07 (1991). To establish that an arbitrator was biased, the moving party must demonstrate that the award was procured by improper means, that there was partiality or corruption on the part of the arbitrator, or that the arbitrator engaged in misconduct that prejudiced the rights of the party. See *United States Dep't of Veterans Affairs Medical Center, North Chicago, Ill.*, 52 FLRA 387, 398 (1996).

Turning to the Agency's initial argument, the Agency claims that evidence from other hearings involving these parties and, subsequently considered by the Arbitrator in determining that the Agency acted "without merit," was not presented at the hearing in this case, and thus, the Agency was denied the opportunity to contest this evidence. Exceptions at 21-22. The Agency argues that it was severely prejudiced by the Arbitrator's actions in this respect.

In the award, the Arbitrator determined that the Agency's actions were without merit by relying on the hearing testimony of the Agency's labor relations specialist that the Agency automatically pays interest when finding an entitlement to backpay in matters such as this. Award at 10. The Arbitrator found that given this statement, there was no justification for the Agency's failure to award the grievant interest payments until a step two grievance was filed. *Id.* Accordingly, while the Arbitrator discussed the Agency's actions in similar grievances before him, he also relied on this separate finding, i.e., the Agency's failure to automatically pay interest, to conclude that the Agency's action was without merit.

Furthermore, with respect to the alleged inappropriateness of the Arbitrator's discussion of other arbitration cases he resolved which involved these parties, the Agency does not cite to any cases, and we are not aware of any, holding that an arbitrator's award is deficient where other proceedings involving the same parties are discussed. Moreover, the Agency does not contend that those previous proceedings were not fully and fairly litigated. Accordingly, the Agency has failed to show that the Arbitrator's actions have so prejudiced the Agency as to affect the fairness of these proceedings as a whole.

The Agency also argues that the Arbitrator impermissibly shifted the burden of proof by requiring the Agency to make an opening statement clarifying its opposition to the Union's arguments. However, it is well established that an arbitrator has considerable latitude in conducting a hearing, and the fact that an arbitrator conducts a hearing in a manner that a party finds objectionable does not, by itself, provide a basis for finding an award deficient. See *AFGE, Local 22*, 51 FLRA 1496, 1497-98 (1996). In the instant case, the Agency merely disagrees with the way the Arbitrator conducted the hearing and, accordingly, does not provide any basis for finding the award deficient.

With respect to the Agency's remaining argument, the Agency contends that the Arbitrator exhibited bias through actions which allegedly displayed animosity towards the Agency and its positions prior to and during the hearing. Specifically, the Agency argues that the Arbitrator made derisive remarks towards its labor relations specialist, criticized the Agency for filing an exception in another case in a closed door meeting that took five hours, and that the tone of this award indicates that the Arbitrator had predetermined his decision. The Agency relies on an affidavit in which the Agency asserts that the Arbitrator, during an *ex parte* conversation, made several statements that exhibited bias.

The Authority has held that arbitration awards are not subject to review on the basis of evidence in existence at the time of the arbitration, but not presented to the arbitrator, or evidence that comes into existence after the arbitration. See, e.g., *NAGE, Local R4-45*, 53 FLRA 517, 519-20 (1997). Even where new evidence or testimony is discovered that would have resulted in a different award if it had been presented at the arbitration hearing, the Authority has held that this is not a sufficient ground for "vitiating the required finality of the original award." *Id.* at 519 (citations omitted). The Authority has also held that, with respect to a claim of personal bias involving an arbitrator, a party must raise that claim for the first time at the hearing, if it could be raised there, or we will not entertain such claims in the absence of exceptional circumstances. *Food and Drug Admin., Cincinnati Dist. Office*, 34 FLRA 533, 535-36 (1990), citing *Early v. Eastern Transfer*, 699 F.2d 552, 558 (1st Cir. 1983); see also *United States Dept't of the Air Force, Air Force Logistics Command, Hill Air Force Base, Ut.*, 34 FLRA 986, 990 (1990). This precedent is consistent with § 2429.5 of the Authority's Regulations, which provides, in pertinent part, "The Authority will not consider

evidence offered by a party, or any issue, which was not presented in the proceedings before. . .the arbitrator."

The Agency does not claim that it raised the issue of bias before the Arbitrator despite having knowledge of the facts alleged in its affidavit during the pendency of the arbitration, or that exceptional circumstances exist justifying our consideration of the issue. Therefore, applying the foregoing precedent, the Agency's affidavit is not properly before us and we will not entertain the Agency's claim.

Accordingly, upon review of the admissible evidence in this matter, we conclude that the Agency has not shown the Arbitrator was biased, and therefore, the exceptions are denied. However, this case, especially in light of our decision in Indian Head, is unusual and warrants the remedial order set forth below. In particular, we note that in Indian Head the Authority found that while bias was not proved, the record showed that the relationship between the Arbitrator and the parties was strained to a degree that called into question the Arbitrator's "continuing ability to assist the parties to resolve their disputes and improve their labor-management relationship." Indian Head, 56 FLRA at 854. This same concern exists in the present matter. Therefore, given the nature of the current exceptions before the Authority, along with our continuing concerns as expressed in Indian Head over the ability of the Arbitrator to assist these parties in the present circumstances, we again will take the unusual action set forth in the Order.

#### D. The Award Is Not Based on Nonfact

To establish that an award is deficient as based on a nonfact, the appealing party must demonstrate that a central, fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. See United States Dep't of the Air Force, Lowry Air Force Base, Denver, Co., 48 FLRA 589, 593 (1993). Moreover, the Authority will not find an award deficient on the basis of an arbitrator's determination on any factual matter that the parties disputed at arbitration. United States Dep't of Health and Human Serv., Denver, Co., 56 FLRA 133, 135 (2000).

The Agency generally asserts under this exception that the Arbitrator relied on facts not in evidence, discussed above, and "clear misstatements of undisputed historical fact" in how it handled the grievant's claim. Exceptions at 24.

Upon review of the Agency's argument, these alleged "nonfacts" were clearly disputed before the Arbitrator, and therefore, this argument does not constitute a basis on which to find this award deficient. Moreover, as the Agency's exception does not otherwise show that a central fact is clearly erroneous, but for which a different result would have been reached by the Arbitrator, the exception is denied.

#### E. The Award is Not Deficient Under the "Interest of Justice Standard"

The threshold requirement for entitlement to attorney fees under the Back Pay Act, 5 U.S.C. § 5596, is a finding that the grievant was affected by an unjustified or unwarranted personnel action, which resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. See United States Dep't of Defense, Defense Distribution Region East, New Cumberland, Pa., 51 FLRA 155, 158 (1995). Once such a finding is made, the Act further requires that an award of fees must be: (1) in conjunction with an award of backpay to the grievant on correction of the personnel action; (2) reasonable and related to the personnel action; and (3) in accordance with the standards established under 5 U.S.C. § 7701(g), which pertains to attorney fee awards by the MSPB. See *id.*

The prerequisites for an award of attorney fees under 7701(g)(1) are as follows: (1) the employee must be the prevailing party; (2) the award of fees must be warranted in the interest of justice; (3) the amount of the fees must be reasonable; and (4) the fees must have been incurred by the employee. See *id.*

The Arbitrator found both that the grievant was affected by an unjustified and unwarranted personnel action, and that the unjustified or unwarranted personnel action resulted in the "withholding of [the] [g]rievant's WIGI and interest on his retroactive back pay." Award at 12. Moreover, the Arbitrator determined that the employee was the prevailing party, had incurred attorney fees during the grievance process, and that the payment of fees would be in the "interest of justice." *Id.* Accordingly, he remanded the question of the "reasonableness" of the attorney fees to the Agency to consider upon the submission of billing records by counsel, and retained jurisdiction to review the Agency's fee award if necessary.

The Agency excepts to two of the above findings. First, the Agency argues that the Arbitrator did not award fees in conjunction with an award of backpay to the grievant on correction of a personnel action.<sup>6</sup> Second, the Agency contends that the Arbitrator's analysis under the interest of justice standard in § 7701(g) is deficient. Exceptions at 15. Because the Agency has not disputed that the other requirements of the Back Pay Act have been met, we need not consider those criteria. *Alabama Association of Civilian Technicians*, 56 FLRA 231, 233 (2000).

Turning to the Agency's argument, that the Arbitrator's finding that attorney fees were warranted in the interest of justice is contrary to § 7701(g), the Arbitrator based his decision on the legal theory that the Agency's action, in failing to immediately pay the grievant interest when it awarded back pay, was clearly without merit under the interest of justice standard.<sup>7</sup> In this respect, the Arbitrator found that the Agency's step one grievance decision failed to find that the grievant was entitled to interest despite its decision to award backpay under the Back Pay Act.

Under the Back Pay Act, an agency shall pay interest on backpay owed. 5 U.S.C. § 5596 (b)(2)(A). The Arbitrator noted that the testimony of the Agency's labor relations specialist indicated that the Agency clearly knew of this requirement. Despite this, the Arbitrator determined that the Agency chose not to award the grievant interest. Accordingly, the Arbitrator determined that the Agency acted without merit when it failed to award the grievant interest in its step one decision.

The Authority stated in *Naval Air Development Ctr., Dep't of the Navy*, 21 FLRA 131, 137 (1986) (Member Frazier concurring) that an Agency's action is "without merit" in circumstances such as where an agency's "careful reading of the relevant statutes and regulations would have promptly shown that its interpretation was erroneous." Had the Agency properly considered the Back Pay Act when it issued its step one grievance response awarding backpay, it should have readily concluded that interest was also due. Therefore, the conclusion of the Arbitrator that the Agency's action was clearly without merit is supported by Authority precedent. As such, the award satisfies the legal requirements for finding that attorney fees are warranted in the interest of justice, and the exception is denied.

#### V. Order

As the issue of the reasonableness of the attorney fees sought remains unresolved, this matter is remanded to the parties, absent settlement, for their resubmission to this Arbitrator to resolve this remaining issue. However, consistent with our decision in *Indian Head*, 56 FLRA 848, if either party objects to resubmission of this matter to this Arbitrator, then the parties are directed to select a different arbitrator to determine the reasonableness of the attorney fees sought.

The Agency's remaining exceptions are denied.

1 Member Armendariz did not participate in this decision.

2 The Arbitrator also addressed a second issue, which he stated was "implicit" in the first, of whether services rendered by a Union representative were compensable as "paralegal" services. The Agency does not except to this portion of the decision, so we will not address it further.

3 Article 9, Section 4(a) reads in pertinent part, "[t]he employer agrees to raise any questions of grievability or arbitrability of a grievance no later than the Step 3 decision." Award at 7.

4 To support its claim of bias, the Agency submitted an affidavit from its labor relations specialist with its exceptions. Agency Exhibit 13.

5 To the extent the Agency's argument also constitutes a "nonfact" exception, such analysis is found below.

6 This argument has been specifically addressed and resolved earlier in this analysis. See Part IV., Section B, supra.

7 The Arbitrator also found that the Agency's actions constituted gross procedural error or negligence. In view of our decision regarding the Arbitrator's additional finding, we need not address this conclusion.