FEDERAL LABOR RELATIONS AUTHORITY

AFGE LOCAL 1633 AND VA MEDICAL CENTER HOUSTON

CASE 0-AR-5354

AMICUS BRIEF OF PETER BROIDA
ON COUNSEL FEE CRITERIA

Amicus is an attorney who litigates cases before the MSPB, EEOC, FLRA, labor arbitrators, and the Court of Appeals for the Federal Circuit; teaches courses concerning federal sector labor relations and civil service law; and who writes a book devoted to analysis of FLRA caselaw, *A Guide to Federal Labor Relations Authority Law and Practice*. *Amicus* has no connection to either party to this proceeding and no financial interest in the outcome of the case. Since the early 1980s, *amicus* has litigated many cases before MSPB, arbitrators, the Federal Circuit, and FLRA involving counsel fee applications.

This submission briefly responds to the invitation by the Authority for *amicus* briefs by its March 1, 2019, Federal Register notice.

I. INTRODUCTION

For almost four decades, the MSPB's *Allen* decision[1], which well chronicles the development of the CSRA counsel fee provisions, has served to guide practitioners and adjudicators in the somewhat elusive quest for what constitutes a reasonable fee warranted in the interest of justice for a prevailing party.[2]

Elucidating litigation before MSPB, the Federal Circuit, and FLRA, has generally, although not always consistently, followed the path of *Allen* as to characterizations of what type of agency conduct satisfies the "interest of justice" standard of 5 USC 7701(g), incorporated by reference into 5 USC 5596(b)(1)(A)(ii).

The factor analysis in *Allen*, ranging from bad faith to gross procedural error, to "knew or should have known,"and more, are, as the Board recognized, somewhat duplicative, and principally derived from some comments by Senator Mathias in a conference committee markup transcript. Those standards have been applied to innumerable disciplinary, adverse actions, and performance-based actions over the

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[1] And *Naval Air Development Center*, 21 FLRA 131 (1986), which adopted the *Allen* criteria.

[2] The concept of a prevailing party is well established at all levels of the courts and MSPB, interpreter of the Back Pay Act. The question is whether the agency's position was changed as a result of an arbitrator's award (or ULP decision).

ensuing decades by MSPB judges, the MSPB, the Federal Circuit, arbitrators, and other adjudicators who follow the Board's example.

FLRA recognizes that the variety of cases coming to it from arbitration involve some disciplinary cases that fit within the *Allen* model, and many cases involving contract violations, e.g., failure to pay a cash award, that do not fit within the MSPB's model.

II. DEPARTURE FROM THE *ALLEN*-BASED CRITERIA FOR CONTRACT DISPUTES NOT INVOLVING DISCIPLINE

A. COMPELLING INFORMATION KNOWN BY MANAGEMENT DEMONSTRATING THAT MANAGEMENT'S POSITION WOULD NOT BE SUSTAINED

Retirement cases appealed to MSPB provide a good point of departure for analysis of fee claims based on grievances successfully challenging monetary benefits involved in nondisciplinary actions—taking the example of failure to receive a cash award, based on a dispute grounded on contract articles involving performance appraisal and awards.

Setting aside the unusual case in which the performance award is denied based on animus or in bad faith, what will be involved in the nondisciplinary case is a difference of opinion over whether the facts establish substantive entitlement to

a contract benefit under a contract article that may not be in dispute, or a difference in opinion as to interpretation and application of a contract article to factual circumstances that may not be in dispute. Those differences of opinion generate many contract-based claims for monetary benefits: authorization for sick leave; repayment of student loan expenses; overtime allocation under FEPA. Bad faith or a variant of bad faith does not ordinarily enter the picture.

In a retirement appeal (failure of OPM to grant, e.g., a disability retirement; failure of OPM to waive a retirement overpayment), there is not going to be an issue of bad faith. OPM may have erred in its assessment of a factual situation when the interpretation or application of a statute or a regulation may not be in dispute, or OPM may have failed properly to apply a statute or regulation when the facts may not be in dispute.

The Board's approach to the retirement appeals is to assess responsibility for fees based on what can objectively be said OPM should have done either through closer examination of information (or governing law) available to it before OPM made its (appealable) decision, or what OPM should have done when, during the pendency of the appeal, OPM received information that it failed to act upon but that, objectively, should have caused it to reverse its position on the underlying benefits determination before MSPB issued its decision granting the benefit claimed in the

appeal.[3]

Taking the example of a dispute over a cash award and the grievance that successfully challenged a contract violation and resulted in backpay, an arbitrator would look at the information available to management at the time of its final decision on the grievance and to the information made available to management during and following the grievance and through the arbitration. If management should not have taken the challenged action, e.g., a benefit denial, in light of compelling information known to it or that should have been known to it during the grievance process, or if management should have reversed its action before the issuance of an award on the basis of compelling information developed during the arbitration process, then it is in the interest of justice to compensate the employee or union for the time of counsel after management was aware that its position was untenable. The key to fee entitlement would be the availability to management of compelling, rather than competing, information demonstrating that management should have been aware that its position would not be sustained.

B. SERVICE TO THE FEDERAL WORKFORCE

A few FLRA decisions have raised the possibility of "service to the federal

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[3] *Kent v. OPM*, 33 MSPR 361, 367–69 (1987); *Farrero v. Office of Personnel Management*, 35 MSPR 630, 633 (1987).

workforce" as a fee determinant. *E.g., Dept. of Army, Red River Army Depot and NAGE Local R14-52*, 39 FLRA 1215, 1221–23 (1991). Even with that standard, there must be an underlying award of backpay. *See AFGE Local 15 and Dept. of Army, Army Sustainment Command*, 63 FLRA 89, 90 (2009).

The federal workforce standard seems to have several times been mentioned, but not once applied in FLRA cases. Note 15 to *Naval Air Development Center*, 21 FLRA 131 (1986), cited the criteria by unexplained reference to *Wells v. Harris*, 1 MSPR 208, 215 (1979). *Wells* had nothing to do with counsel fees.

Most arbitration awards involving backpay arguably benefit the federal workforce—the matter is one of degree. An overtime pay award under FEPA may involve one or a thousand employees. A contract article interpreted in a particular manner in a single grievant's case may result in a modest backpay recovery for that person, but the contract interpretation may affect a national bargaining unit. The "workforce service" is a nebulous criterion upon which to rest an "interest of justice" standard—too nebulous to be relied on by arbitrators whose awards will then be subject to exceptions, leading to extensive litigation over counsel fees (a secondary component of a case), with resulting further applications for "fees on fees."

C. THE CONCEPT OF PROPORTIONALITY

One element involved in consideration of fees absent from Board decisions is proportionality. Does it make sense to incur, and request the government (taxpayers) to pay, $100,000 in fees for a two day suspension? The Board and the courts reduce fees for frivolous pleadings, unnecessary duplication of attorneys' time, and for time spent on unproductive claims in otherwise meritorious appeals, but the Board has made no effort to balance the size of the fee against the result achieved. It is worth consideration as an added element to whatever variant of the *Allen/NADC* equation the FLRA decides to adopt.

III. REASONABLE HOURLY RATE

Turning to the reasonableness of fees, the *Laffey* Matrix construct creates a fee structure that is higher than what most employment lawyers would ordinarily charge unions or individuals that retain them (assuming the lawyer expects to be paid by the client). The matrix has the value of simplicity. Lawyers may seek to design retainer agreements that charge the client one rate but seek to allow recovery of the higher *Laffey* rate.

The key determinant is the reasonableness of a fee for the nature of the work performed and the result achieved. It does not make much sense for similar cases to result in greatly disparate fee awards depending on what is put into a retainer

agreement (which may or may not actually be paid by the client) or what is found in the *Laffey* matrix for lawyers in the D.C. area but not for those practicing elsewhere.

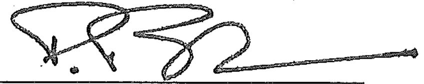
To avoid subjective evaluation of results and resultant fees, and to avoid somewhat artificial determinants such as rates stated in retainer agreements or the *Laffey* matrix, a better, if more nuanced, approach is the time-honored evaluation of evidence of hourly rates awarded to a lawyer in comparable cases or awarded to lawyers of similar qualifications in comparable cases—an analysis further informed by consideration of the attorney's level of experience and expertise. There may be lawyers who have no history of fee awards and who have no comparators, meaning that primacy may be placed on the rates set in retainer agreements, measured against the adjudicator's discretionary assessment of what is reasonable. Lacking a statutory cap, as in EAJA, valuation of a professional's work is necessarily subjective, but it should not be formulaic.

IV. REQUIRED ELEMENTS OF A FEE PETITION

Concerning the evidentiary requirements for a fee petition, the Board's regulation at 5 CFR 1201.203, has worked well. A similar FLRA regulation would work for ULP cases. FLRA does not directly regulate arbitrators, although through its case law, as here, it could establish the basic structural requirements for fee petitions

submitted to arbitrators.

Respectfully submitted,



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SERVICE

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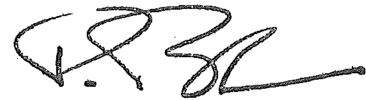

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