



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for August 10, 2018

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COURT DECISIONS

PRECEDENTIAL:

Petitioners: Federal Education Association, Karen Graviss

Respondent: Department of Defense

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2015-3173](#)

Arbitration Case No.: 14-1024-00182-7

Issuance Date: August 6, 2018

In a prior decision, the panel reversed the arbitrator's decision to sustain Ms. Graviss's removal. The full court granted en banc review and vacated the panel decision but subsequently discovered that there was a question as to the timeliness of the petition for review to the court. Following oral argument and supplemental briefing on the court's jurisdiction under 5 U.S.C. § 7703(b)(1), the en banc court dissolved en banc status and referred the case back to the panel to consider the court's jurisdiction in the first instance.

Holding: The panel dismissed the petition for review for lack of subject matter jurisdiction.

(1) Under 5 U.S.C. § 7703(b)(1), "any petition for review shall be filed within 60 days after the Board issues notice of the final order or

decision of the Board.” An employee who is a member of a collective bargaining unit may choose to challenge the action through arbitration, rather than filing an appeal with the Board. When an employee pursues arbitration, the statute specifies that “judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board.” The court held that “the statutory requirement that any petition for review must be filed within 60 days after the Board ‘issues notice’ of a final decision applies with equal force to arbitration decisions.”

(2) The date the decisionmaker “issues notice” is the date on which it sends the parties the final decision. Here, the arbitrator “issued notice” on April 21, 2015, the date of the postmark. Because 60 days from that date was a Saturday, the petition for review was due on Monday, June 22, 2015, and was untimely filed under § 7703(b)(1) when it was received on June 23, 2015.

(3) The filing deadline under § 7703(b)(1) is jurisdictional and is therefore not subject to equitable tolling.

The dissent would find that the filing deadline under § 7703(b)(1) is not jurisdictional.

NONPRECEDENTIAL:

Ashe v. Department of Health and Human Services, [Nos. 2018-1390, 2018-1465](#) (Fed. Cir. Aug. 9, 2018) (MSPB Docket Nos. DC-1221-16-0619-W-1, DC-0752-17-0352-I-1): The court affirmed the administrative judge’s decisions denying the appellant’s request for corrective action under the Whistleblower Protection Act and sustaining his removal.

Cristobal v. Office of Personnel Management, [No. 2018-1429](#) (Fed. Cir. Aug. 9, 2018) (MSPB Docket No. SF-0831-17-0618-I-1): The court affirmed the administrative judge’s decision affirming the Office of Personnel Management’s final decision denying the appellant’s request for annuity benefits for his prior Federal service under the Civil Service Retirement System.