



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for December 7, 2018

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COURT ORDER

Petitioners: Federal Education Association - Stateside Region, Karen Graviss
Respondent: Department of Defense, Domestic Dependents Elementary and Secondary School

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

Case Number: [2015-3173](#)

Arbitrator's Decision No.: 14-1024-00182-7

Issuance Date: December 3, 2018

The agency removed the respondent from her position and she sought review of the removal by an arbitrator. The arbitrator issued a decision sustaining the removal. The respondent then petitioned the Federal Circuit for review of the arbitrator's decision. The Federal Circuit initially reversed the arbitrator's decision in a panel decision, then the full court granted en banc review and vacated the panel decision. Before the en banc oral argument, the Federal Circuit discovered that the timeliness of the appeal was in question. After en banc oral argument and supplemental briefing concerning the timeliness issue, the en banc court dissolved the en banc status and returned the case back to the original panel. In a panel decision, the court dismissed the appeal for lack of jurisdiction because it found that the petition for review of the arbitrator's decision was untimely filed under 5 U.S.C. § 7703(b)(1).

The respondent subsequently filed a petition for rehearing en banc, which was initially referred as a petition for rehearing to the original panel and then

referred to the circuit judges who are in regular active service. The judges denied the petition for panel rehearing and the petition for rehearing en banc.

Circuit Judge Wallach, joined by Circuit Judges Newman and O'Malley, dissented from the denial of the petition for rehearing en banc, submitting that the majority's interpretation that the filing deadline set by 5 U.S.C. § 7703(b)(1) is jurisdictional is inconsistent with U.S. Supreme Court precedent.

Circuit Judge Plager issued a separate dissent from the denial of the petition for panel rehearing, similarly submitting that the majority's interpretation that the filing deadline is jurisdictional is contrary to U.S. Supreme Court precedent.

BOARD DECISION ON STAY REQUEST

NONPRECEDENTIAL:

Special Counsel ex rel. Robert Cameron v. Department of Veterans Affairs, [MSPB Docket No. CB-1208-19-0001-U-1](#) (November 30, 2018). The Board granted a request by the Office of Special Counsel (OSC) to stay for 45 days the separation of Dr. Robert Cameron, a thoracic surgeon at the agency's Greater Los Angeles Healthcare System, while it completes its investigation and legal review of the matter and determines whether to seek corrective action. The Board found, based on OSC's assertions in its stay request and given the deference generally afforded to OSC in these requests, that there are reasonable grounds to believe that the agency decided to separate and coerced the retirement of Dr. Cameron based on his protected disclosures regarding patient health and safety in violation of 5 U.S.C. § 2302(b)(8).