



## U.S. MERIT SYSTEMS PROTECTION BOARD

### **Case Report for April 5, 2019**

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#### **COURT DECISIONS**

##### **PRECEDENTIAL:**

**Petitioner:** AFGE LOCAL 3599

**Respondent:** Equal Employment Opportunity Commission

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

**Case Number:** [2018-1888](#)

**Arbitrator's Decision No.:** 170711-0278

**Issuance Date:** March 29, 2019

##### **Attorney Fees**

- Authority to Award

The agency removed an employee and his union, the petitioner here, took his removal case to arbitration. After a hearing, the arbitrator reversed the employee's removal and ordered his reinstatement. The arbitrator also denied the union's request that the agency pay the arbitration costs and attorney fees. Both parties requested reconsideration of the arbitrator's decision, which the arbitrator denied.

On appeal to the Federal Circuit, the union challenged the arbitrator's failure to award attorney fees for the arbitration proceeding. The agency did not seek review of the arbitrator's decision to reverse the

employee's removal.

**Holding:** The court held that the arbitrator erred by failing to provide an explanation for his decision not to award fees. The court therefore vacated the arbitrator's decision as to the fees issue and remanded the case for the arbitrator to reconsider the issue of fees and to include a statement of reasons for whatever decision he reaches on that issue.

1. The court set forth that the fee statute that applies to Board cases, 5 U.S.C. § 7701(g), also applies to arbitration awards. Under section 7701(g), an adjudicator may require an agency to pay the employee's reasonable attorney fees if the employee is the prevailing party and the adjudicator determines that payment by the agency "is warranted in the interest of justice."
2. The court determined that the arbitrator did not articulate a rational explanation for denying a fee award. The court stated that, in order for it to be able to conduct its reviewing responsibility, even on a matter as to which the adjudicator is given broad deference, it is ordinarily necessary for the adjudicator to provide some sort of explanation for its action.
3. The court further noted that the agency had argued to the arbitrator that attorney fees could not be awarded here given the wording of the arbitration clause in the parties' collective bargaining agreement. The court found, however, that the argument was "plainly invalid." The court reasoned that, because the agency made that invalid argument to the arbitrator, the agency could not assert that the arbitrator denied fees based on a valid ground, rather than on the invalid ground that it had proposed.

**NONPRECEDENTIAL:**

*McPherson v. Department of Homeland Security*, No. [2018-2218](#) (Fed. Cir. Apr. 4, 2019) (MSPB Docket No. DA-1221-17-0462-W-1) (affirming the Board's decision in this individual right of action appeal that found that the agency proved by clear and convincing evidence that it would have terminated the petitioner in the absence of his protected disclosures).

*Green v. Merit Systems Protection Board*, No. [2018-2264](#) (Fed. Cir. Apr. 4, 2019) (MSPB Docket No. CH-0841-18-0317-I-1) (affirming the Board's decision that dismissed the petitioner's appeal of a decision from the Office of Personnel Management (OPM) for lack of jurisdiction because the OPM decision was not a final agency decision reviewable by the Board).

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