



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for May 8, 2020

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Jimmiekaye Buffkin
Respondent: Department of Defense
Tribunal: U.S. Court of Appeals, Federal Circuit
Case Number: [No. 2019-1531](#)
Docket Number:
Issuance Date: May 1, 2020

ARBITRATION/COLLECTIVE BARGAINING-RELATED ISSUES

- INTERPRETATION OF CONTRACT
- DEPARTURE FROM PRECEDENT

TIMELINESS

- TIMELY FILING
- PREMATURETY

The appellant was employed by the agency as a teacher in a school for the children of military personnel operated by the agency. The appellant is a member of the Federal Education Association—Stateside Region (the “union”) and covered by a collective bargaining agreement (CBA) between the union and the agency. The agency removed the appellant for misconduct. She elected to challenge her removal through the CBA’s negotiated grievance

process.

In relevant part, the CBA provided that to invoke arbitration, a party must submit a written request for arbitration on the opposing party within 20 days of the "last day of mediation." The parties engaged in mediation in 2012, but did not reach an agreement. In 2014, the union submitted a written request for arbitration to the agency on the appellant's behalf. Between 2014 and 2017, the appellant and the agency prepared for arbitration, including holding another mediation session in 2015 and selecting an arbitrator in 2017. In January 2018, the agency argued before the arbitrator, for the first time, that the union's request was untimely. After holding a hearing, the arbitrator dismissed the case as untimely under the CBA because the union did not make its request within 20 days of the end of the 2012 mediation.

The appellant filed an appeal with the Federal Circuit, challenging the arbitrator's dismissal of her case.

Holding: The arbitrator was bound by the Board's substantive rules and the decisions of the Federal Circuit, not those of the Federal Labor Relations Authority (FLRA).

1. The arbitrator applied FLRA law because he concluded that he was bound to do so by the CBA. The court disagreed.
2. The court explained that, under the Civil Service Reform Act's scheme, Congress intended for FLRA law to apply in a case that is appealable to the FLRA, such as an unfair labor practice charge. In contrast, "matters involving hiring, firing, failure to promote, and the like," such as the removal at issue here, are within the Board's jurisdiction.
3. The court determined that, under the long-standard Supreme Court precedent set forth in *Cornelius v. Nutt*, 472 U.S. 648 (1985), and consistent with Congress' intent, arbitrators therefore must apply the Board's substantive rules and the decisions of the Federal Circuit when reviewing otherwise appealable actions an individual has elected to challenge through arbitration, rather than before the Board.

Holding: The union's 2014 request for arbitration was not untimely; however, remand is necessary for the arbitrator to determine in the first instance whether the union's premature request is now ripe for review.

1. The time limits at issue here were procedural and set by the CBA, not by statute; the court reviewed the arbitrator's timeliness decision de novo.
2. The arbitrator strictly construed the CBA to find that "the last day of mediation," which triggered the filing period, was the end of the 2012 mediation, not the 2015 mediation, because the CBA did not provide for

a second mediation.

3. The court disagreed, finding that, under the plain language of the CBA, the union had 20 days after the last day of mediation, which occurred in 2015, to invoke arbitration. The past practices of the agency in over 60 contemporaneous grievances it handled and the conduct of the parties during this process showed that the parties intended for the grievance to remain open through the second mediation. Thus, the invocation of arbitration in 2014 was not too late under the CBA.
4. The court next considered whether the request was premature. It observed that, both in practice and as codified in its rules, the Federal Circuit may consider prematurely filed notices of appeals to be ripe for review upon the entry of a final judgment below. Further, it recognized that forfeiture of rights due to a timeliness issue generally is disfavored when the issue is not jurisdictional, but rather is a procedural defect, and unless the defect is “clearly harmful to the resolution of the merits.”
5. The court posited that the union’s 2014 arbitration request was not a clearly harmful procedural defect; however, it determined that the arbitrator should address the issue in the first instance before reaching a finding.

The Federal Circuit vacated the arbitrator’s dismissal and remanded the case to the arbitrator.

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