

**CASE DIGEST:** *AFGE, Local 1633*, 71 FLRA 211 (2019) (Member Abbott concurring; Member DuBester concurring in part, and dissenting in part)

This case concerned grievants who successfully sought environmental differential pay for their duties. The Arbitrator awarded backpay, but denied the Union's request for attorney's fees because the parties' agreement did not provide for attorney fees. The Authority issued a Federal Register notice soliciting briefs regarding whether and how the Authority should reevaluate its reliance on the *Allen* factors in attorney fee cases. Remanding the case to the Arbitrator to re-evaluate the request for attorney fees, the Authority clarified the applicable legal standard for an award of attorney's fees in an arbitration proceeding under the Back Pay Act (BPA) in non-disciplinary cases, focusing on the "knew or should have known" and "clearly without merit" factors.

Member Abbott wrote separately in concurrence to note the central premise of the decision rested on the precarious definition by OPM of "unjustified or unwarranted personnel actions" and the Merit Systems Protection Board's interpretation of 5 U.S.C. § 7701(g)(1). Congress would have to resolve other questions concerning attorney fees such as proportionality, the applicability of the *Laffey* matrix, and reasonableness of fees for in-house attorneys.

Member DuBester dissented. He agreed with the decision to deny the Agency's exceptions and to remand the award to the parties for resubmission to the Arbitrator to make specific findings as to whether an award of attorney fees is appropriate. But Member DuBester strongly disagreed with the majority's modification of the standards used to determine entitlement to attorney fees in arbitration awards in which the grieved action is not disciplinary in nature because neither party raised the appropriateness of the *Allen* factors. Thus, Member DuBester found that reconsideration of the *Allen* factors was not ripe for review in this case.

This case digest is a summary of a decision issued by the Federal Labor Relations Authority, with a short description of the issues and facts of the case. Descriptions contained in this case digest are for informational purposes only, do not constitute legal precedent, and are not intended to be a substitute for the opinion of the Authority.