

CASE DIGEST: *AFGE, Local 2076*, 71 FLRA 221 (2019) (Member DuBester concurring in part and dissenting in part)

In this case, the Authority clarifies how *Allen* factor (5)—i.e., whether the Agency “knew or should have known” that its action would not be sustained—applies in the context of minor disciplinary actions. The underlying grievance involved a disciplinary charge and fourteen-day suspension. The Arbitrator upheld the disciplinary charge and mitigated the penalty to a five-day suspension. The Union then filed a request for attorney fees, which the arbitrator denied with a non-coherent explanation. On exceptions, the Union argued the denial of attorney fees was contrary to law.

The Authority held that in determining whether an award of fees is warranted in the interest of justice under *Allen* category (5), arbitrators must evaluate the nature and strength of the evidence that was available to the agency and assess whether its penalty determination was reasonable. Furthermore, because the record does not permit the Authority to determine the proper resolution of the matter, the Authority remanded the case for further proceedings to assure that the resolution of a request for attorney fees is consistent with law.

Member DuBester wrote separately, agreeing with the decision to remand the award for resubmission to the Arbitrator because he failed to make specific findings as to whether an award of attorney fees is appropriate and disagreeing with the majority’s decision to modify the standard governing whether attorney fees are warranted under *Allen* category (5).

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.