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ADR Case Update 2018 - 22

## Federal Circuit Courts

- **AWARD VACATED AND REMANDED TO DETERMINE ARBITRATOR'S AUTHORITY TO IMPOSE PENALTIES**

*Sihota v. Internal Revenue Service*

2018 WL 5914583

United States Court of Appeals, Federal Circuit

November 13, 2018

IRS employee Dalwinder Sihota filed her taxes improperly in 2003, resulting in an underpayment of \$5341. The IRS terminated her employment under Section 1203(b)(9) of the IRS Restructuring and Reform Act of 1998, which requires the agency to terminate any employee who willfully understates their federal tax liability. The Union invoked arbitration on Sihota's behalf and requested a hearing date from IRS counsel. IRS counsel responded with questions about potential dates, after which there was no further communication between the parties until the arbitration hearing was held over three years later. The arbitrator found that Sihota's actions did not constitute willful neglect under 1203(b)(9). He reinstated Sihota, imposed a ten-day suspension, and determined that Sihota was not entitled to the three years of back pay that accrued after her removal. Sihota petitioned for review of the arbitrator's decision.

The United States Court of Appeals, Federal Circuit, vacated and remanded. Sihota asserted that the only charge before the arbitrator was under 1203(b)(9), which required willful understatement of federal tax liability. Because the arbitrator held that Sihota did not act willfully, Sihota asserted, he had no authority to impose a 10-day suspension or to reduce back pay by three years. The Court noted that the arbitrator could have imposed a mitigated penalty if he had sustained an alternate charge against Sihota; however, it was not clear which charges were properly considered by the arbitrator or which charges supported the penalties. Even if the arbitrator did have the authority to impose a mitigated penalty, the Court found nothing in the arbitrator's decision to support the decision on back pay. The arbitrator misapplied the doctrine of laches; though the Union's three year delay in scheduling a hearing was inexplicable, any reduction in back pay must be within the "tolerable limits of reasonableness." The Court vacated and remanded for the arbitrator to determine which charges were submitted for arbitration. If the only

charge at issue was under 1203(b)(9), then penalties could not be imposed.

- **PRELIMINARY INJUNCTION ENJOINING ARBITRATION PROCEEDINGS DENIED**

*The Pike Company, Inc. v. Tri-Krete Limited*  
2018 WL 6060927  
United States District Court, W.D. New York  
November 20, 2018

Construction contractor Pike subcontracted with Tri-Krete to complete the architectural precast work for a project at Marist College. Pike sued Tri-Krete for breaching the subcontract and the work order. Tri-Krete counterclaimed for breach of contract, unjust enrichment, and violations of the New York Prompt Payment Act (PPA) and moved to stay the action and compel arbitration. Pike moved to stay the arbitration and for preliminary injunction enjoining arbitration proceedings.

The United States District Court, W.D. New York granted Tri-Krete's motion to compel arbitration and stay the litigation. To obtain the preliminary injunction, Pike had to establish a likelihood of irreparable harm absent preliminary relief, which hinged on whether Tri-Krete's claims were arbitrable under the PPA. If they were arbitrable, then Pike would suffer harm in arbitrating (*Emery Air*); if they were not, then requiring Pike to arbitrate would result in irreparable harm. (*Maryland Casualty*) PPA §756 provides that if the parties to a construction contract are unable to resolve a dispute over an invoice, then the aggrieved party may refer the matter to AAA for expedited arbitration. Pike asserted that the dispute resolution clause in its subcontract with Tri-Krete, which gave it the right to reject arbitration, allowed it to avoid the PPA's arbitration requirements. PPA §757, however, prohibited any contractual provision – such as the one invoked by Pike – that would render PPA's expedited arbitration remedy unavailable to one or both of the parties. This dispute fell within the scope of the PPA's arbitration provision because the provisions were triggered by an allegation that Pike violated the PPA. Tri-Krete satisfied the prerequisites of §756: it sent a letter to Pike outlining the PPA violations, notified Pike that the parties were obliged to attempt to resolve the violations, and informed Pike that it would refer the matter to AAA within 15 days if the parties did not resolve the matter. The Court noted that the only arbitrable claims were the PPA violations alleged by Tri-Krete; everything else would need to be resolved through litigation.

*Case research and summaries by Deirdre McCarthy Gallagher and Richard Birke.*

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