



United States  
Office of  
Personnel Management

Washington, DC 20415-2001

In Reply To:

Your reference:

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DATE: April 23, 2007

MEMORANDUM TO: MEMBERS  
NETWORK ON EMPLOYEE & LABOR RELATIONS

FROM: ANA A. MAZZI  
Deputy Associate Director  
Center for Workforce Relations & Accountability Policy

Subject: Case Listing Number 1104

**FEDERAL LABOR RELATIONS AUTHORITY DECISIONS**

62 FLRA No. 1;  
62 FLRA 1  
0-NG-2844  
January 25, 2007

[\*Nat'l Association of Independent Labor and U.S. Environmental Protection Agency\*](#). The proposal, as relevant here, provides that an employee may request a review by a Peer Panel of a disputed performance plan and that the Peer Panel would be only advisory with management retaining final decision authority. The FLRA found the proposal to be within the duty to bargain as a procedure under § 7106(b)(2) of the Statute. Citing precedent, the FLRA explained that proposals to establish a committee to recommend changes where the agency retains the discretion to accept or reject the recommendations are negotiable procedures. Under this proposal, according to the FLRA, the recommendations stemming from the committee would be non-binding upon management's ultimate decision. In addition, the FLRA noted the proposal does not require a specific employee or supervisor to serve on the panel, nor does it require a specific supervisor to ultimately determine an employee's performance plan. The FLRA also added that proposals that are procedures are negotiable even though they may require some action by management to implement the procedure.

62 FLRA No. 2;  
62 FLRA 4  
0-AR-3998  
January 25, 2007

[\*U.S. Dep't of the Navy, Puget Sound Naval Shipyard and Intermediate Maintenance Facility, Bremerton, WA and Bremerton Metal Trades Council, IBEW, Local 574\*](#). The Arbitrator determined the Agency violated the parties' collective bargaining agreement when it denied the grievant the opportunity to work overtime, and he awarded the grievant backpay. The FLRA rejected the Agency's claim that the award is contrary to management's right to assign work under § 7106(a)(2) (B) of the Statute. Applying precedent, the FLRA found the enforcement of the applicable contract provision of the parties' agreement satisfies Prong I of the *BEP* test because, by requiring that management distribute overtime work fairly and equitably to those employees management determines are qualified, the contract provision is a matter negotiated pursuant to § 7106(b)(2) of the Statute. The FLRA also found that the Agency's contrary to management's right to determine its organization claim was barred by § 2429.5 of the FLRA's regulations because it was an issue that could have been, but was not, presented to the Arbitrator. Finally, the FLRA denied the Agency's claim that the Arbitrator should have ordered make up overtime rather than back pay and declined an invitation to take a "fresh look" at the issue. The FLRA found no reason to reverse previous rulings, finding back pay in line with statutory requirements, and noted the wide latitude given to arbitrators to fashion remedies.

62 FLRA No. 3;  
62 FLRA 9  
0-AR-4170  
January 30, 2007  
62 FLRA No. 4;  
62 FLRA 10  
0-AR-4152  
January 30, 2007

[AFGE, Local 3947 v. U.S. Dep't of Justice, Bureau of Prisons, Federal Medical Center, Rochester, MN.](#) The FLRA denied the Union's procedural arbitrability and contrary to law exceptions to an arbitration award, not otherwise described.

[NAGE, SEIU, Local 1998 and U.S. Dep't of Veterans Affairs, Perry Point Medical Center, Perry Point, MD.](#) The FLRA denied the Union's exceeded authority and procedural arbitrability exceptions to an arbitration award, not otherwise described.

62 FLRA No. 5;  
62 FLRA 11  
AT-RP-06-0020  
February 2, 2007

[U.S. Dep't of the Navy, Commander, Navy Region Southeast, Jacksonville, FL and AFGE, Local 2010, et al.](#) Following reorganization, the Agency petitioned the FLRA to consolidate eleven AFGE bargaining units on a regional basis. Several units filed their own identical petitions for consolidation. AFGE national filed a similar petition and the units seeking consolidation asserted that AFGE national would be the exclusive representative in the consolidated unit. Several individual units opposed consolidation. The Regional Director (RD) found that the employees in all units shared a community of interest and the consolidated unit would promote effective dealings. The RD particularly noted the parties operated under a multi-unit agreement. The dissenting locals petitioned for review, contending that the term "labor organization" contained in the Statute intends one exclusive representative. They also noted there were 11 locals with exclusive rights, and a consolidation could not occur unless all agreed. The FLRA denied the application for review, explaining that the locals misconstrued the meaning of the term, "labor organization." The FLRA stated that AFGE is a labor organization as defined in the Statute. The FLRA also stated that AFGE holds exclusive representation rights for all of the locals involved in this case, and it indicated its intent to serve as exclusive representative in a new unit. Citing precedent, the FLRA ruled that where multiple units of a labor organization are proposed for consolidation, if that labor organization has recognition as the exclusive representative of those units, and all other criteria under the Statute are met, the consolidated unit will promote effective dealings and will constitute an appropriate unit. In addition, the FLRA distinguished its finding in this case from an earlier decision where it refused to find a consolidated unit of two AFGE locals because the locals themselves held certifications as exclusive representatives and there was no apparent or asserted bargaining representative for the consolidated unit.

62 FLRA No. 6;  
62 FLRA 15  
0-NG-2881  
February 6, 2007

[AFGE, Local 1712 and U.S. Dep't of the Army, Alaska Civilian Personnel, Advisory Center, Fort Richardson, Alaska.](#) The proposal would permit the IT staff to maintain the *status quo* of working in the IT office behind a closed and locked door during business hours, rather than working in that office with the office door open, as proposed by the Agency. The FLRA found the proposal outside the duty to bargain. The FLRA determined that by failing to respond to the Agency's statement of position, the Union conceded to the Agency's arguments that the proposal affects management's rights to direct and assign work to employees pursuant to § 7106(a)(2)(A) and (B) of the Statute, and to determine the internal security practices of the Agency pursuant to § 7106(a)(1). The FLRA also ruled on the Agency's assertions. The FLRA found the Agency's decision to unlock the door for the purposes of assigning, directing, monitoring and reviewing the IT employees' work was an exercise of its rights to direct employees and assign work and that the Union's proposal affected these rights by precluding unannounced visits and essentially any supervisory oversight. The FLRA also stated that provisions dealing with locked doors in the workplace fall within an agency's right to determine its internal security practices and that the Union's proposal affected the Agency's ability to protect its personnel by requiring that the door remain locked during business hours.

62 FLRA No. 7;  
62 FLRA 18  
AT-RP-06-0004  
February 6, 2007

[SSA, Kissimmee District Office, Kissimmee, FL and AFGE, AFL-CIO.](#) The Agency created a new district office in its Atlanta region and of the 35 employees in the new office, 27 were employed by the agency in other offices who came to the office voluntarily through a variety of personnel actions. The Union claimed the new office was a successor employer and the employees should be added to a consolidated nationwide unit containing more than 50,000 members without an election. The Regional Director (RD) agreed. In its application for review, the Agency argued the RD misapplied all three criteria for determining successorship. The FLRA denied the application for review. The FLRA rejected the Agency's claim that only a reorganization, not the creation of a new office, constitutes the triggering event necessary for successorship because successorship is applicable in a

myriad of situations, including preexisting or newly established organizations. The FLRA also concluded the RD properly found the Agency employees who moved to the new office were transferred. The FLRA explained that for successorship purposes, the term "transfer" is generic, referring to any organizational movement of employees within an agency or between agencies regardless of the method of the reorganization. Thus, according to the FLRA, the fact that all employees applied to work in the new office voluntarily did not mean they were not transferred. Finally, the FLRA explained the RD properly determined an election was not necessary, noting that 27 of the 35 employees who came to the office had been represented in the nationwide bargaining unit. The FLRA also noted that the number of represented employees exceeded the number not represented, and no other union sought to represent the employees.

### FEDERAL SERVICE IMPASSES PANEL DECISIONS

07 FSIP 31  
February 23, 2007

[Dep't of the Air Force, Air Force Reserve Command, March Air Reserve Base, CA and Local 3854, AFGE, AFL-CIO](#). The Agency cancelled the 5-4/9 schedule worked by approximately 180 aircraft mechanics in the Maintenance Group, where the vast majority had either a Monday or Friday as their regular day off. The impasse before the Panel concerned whether the Agency's decision is supported by evidence that the schedule is causing an adverse agency impact. The Agency argued that overall performance had fallen below established standards because of the reduced staffing levels on Mondays and Fridays. As support, the Agency cited overtime costs and presented data indicating problems such as a reduction in mission capability rate and an unacceptable rate of flight schedule effectiveness. The Agency also noted that while the number of aircraft it is required to maintain has increased, it has 109 vacant positions. The Union contended the Agency failed to establish that the cited problems were connected to the work schedule. The Panel found the Agency failed to meet its burden of proving adverse agency impact and ordered the Agency to rescind its determination to terminate the CWS. The Panel found the Agency had not broken down overtime costs by workday thereby failing to show that the regular days off worked by most employees resulted in the increased overtime. The Panel also took note of the 109 vacant positions, and the fact that the number of aircraft to be serviced had increased. The Panel concluded these factors, not the CWS, were the primary cause of the Agency's inability to meet expectations. Finally, the Panel concluded the record contained no specific evidence linking delays in aircraft maintenance with the CWS or employees' choice of days off.

06 FSIP 128  
March 26, 2007

[Dep't of HHS, Food and Drug Administration, Arkansas Regional Laboratory, Jefferson, Arkansas and Chapter 254, NTEU](#). The impasse before the Panel concerned the parties disagreement over a variety of AWS-related issues, including, as relevant here, whether their local AWS agreement should specify the office's core hours and require employees to obtain prior supervisory approval to work more than 10 hours per day or after 6 p.m. and on weekends. The Agency contended there is no need to supersede the existing policy maximum of 10 hours/day without supervisory approval because there is no regularly recurring amount of available work requiring more than a 10-hour day to accomplish. The Agency also contended that supervisory approval for work on weekends or after 6 p.m. on weekdays is necessary because of the lack of full security guard support, the lack of co-workers to accomplish the work in an efficient manner and the lack of supervision. The Agency further asserted that the core hours contained in its offer and its proposal that employees on AWS provide estimated daily arrival and departure times prior to the start of the pay period are consistent with existing policies. The Union contended that its proposed core hours are consistent with a Memorandum of Clarification and that the Agency has presented no evidence that permitting employees to work more than a 10-hour day without supervisory approval would negatively impact productivity, increase costs, or reduce its ability to serve its clients. The Panel concluded the Agency's final offer provides the better basis for resolving the dispute. The Panel was "persuaded" that employees normally do not need more than 10 hours per day to accomplish their work requirements and that the Agency's expressed interest in limiting employees' work hours outweighs the need for the increased flexibility proposed by the Union. With regard to the provision concerning whether employees should be required to provide estimated daily arrival and departure times, the Panel, in agreement with the Union, found this issue was never the subject of negotiations or mediation prior to the Panel's determination to assert jurisdiction. Accordingly, the Panel ordered the parties to adopt the Agency's final offer, with the exception of that provision.

07 FSIP 27  
March 26, 2007

*Dep't of Transportation, Saint Lawrence Seaway Development Corporation, Massena, N.Y. and Local 1968, AFGE, AFL-CIO.* The impasse before the Panel concerned whether the Agency should be entitled temporarily to shut down the entire shift swap program for abuse by as few as one employee. The Agency contended that when the shift swap program was first negotiated over 4 years ago, its concern for increased overtime costs was resolved by including a provision permitting the Agency to shut down the program if abused by employees. The Agency asserted that although the program has moved past the pilot stage, it is imperative the Agency maintain such a provision as a continuing incentive against abuse. The Union contended there has not been any evidence of abuse over the 4 years and proposed that any employee who abuses the program be removed from the program. The Panel ordered the parties to adopt the Union's proposal. The Panel found it unclear whether the program's past success is solely attributable to the Agency's ability to shut it down for any employee abuse. The Panel stated that given the parties have conducted two trial periods, and that there has been no evidence of abuse, the employees have earned the right to continue the program without such a stringent requirement. The Panel noted that should abuses occur in the future, the Agency will have the opportunity to propose its approach again when the contract expires.

06 FSIP 109  
March 27, 2007

*Dep't of Commerce, Patent and Trademark Office, Alexandria VA and POPA.* The impasse before the Panel concerned whether the Agency's severability proposal involves a mandatory subject of bargaining that should be included in the ground rules agreement governing negotiations over a successor collective bargaining agreement. The Agency proposed that if one or more provisions in a newly-negotiated CBA are disapproved under agency head review and ultimately found nonnegotiable, they would be severed from the remainder of the CBA, and all other CBA provisions would go into effect immediately. The Agency asserted that a severability clause is necessary to ensure that the parties do not have to endure years of litigation over whether various aspects of the agreement are legally in effect. The Union contended that the Panel should either decline to retain jurisdiction over the Agency's proposal or order that it be withdrawn because by not negotiating over a severability proposal, a bargaining impasse over the merits of the issue has not been reached. The Panel declined to retain jurisdiction over the parties' dispute. In the Panel's view, the parties have not reached a bargaining impasse over the Agency's proposal because of the underlying question concerning the Union's obligation to bargain. According to the Panel, the record revealed that the Union consistently has refused to participate in bargaining and mediation over a severability clause because it believes the issue involves a permissive subject that it is legally entitled to elect not to negotiate. The Panel stated that while FLRA case law suggests that parties may voluntarily agree to the piecemeal implementation of a CBA, and to resume bargaining only over those provisions that are disapproved on agency head review, the Panel only has authority to consider the merits of a proposal where parties have reached a negotiation impasse. Accordingly, the Panel concluded the underlying threshold question raised by the Union must be resolved in an appropriate forum, and an impasse reached, before the Panel may consider the merits of the Agency's proposal.

06 FSIP 66  
April 4, 2007

*Dep't of the Treasury, IRS, Wash., D.C. and NTEU.* The impasse before the Panel concerned, among other things, the Agency's proposal to increase the current 2-year period that tax-related letters of reprimand should be retained in an employee's personnel file and the procedures for implementing the change in retention time.

1. *Communicating the Change to Employees* - The Union proposed that meetings to disseminate information to employees about the initiative "generally" occur within 60 days of the effective date of the parties' Letter of Understanding (LOU) and that the Agency would provide a hard copy of the LOU and a list of frequently asked questions. The Agency proposed that the parties jointly develop information to be communicated to employees regarding the change in retention time for a tax-related letter of reprimand as quickly as possible following approval of the agreement and that the Agency would provide a hard copy of the LOU to employees who do not have intranet access. The Panel ordered the parties' to adopt the Union's final offer because it found it to be more effective in ensuring that employees are made aware of an important change in policy which could lead to their removal from employment for recurring tax-related offenses. The Panel also found that the Union's proposal does not appear to impose onerous requirements on management since the time frame for meeting with employees about the change is not mandated.

2. Scope of the Change - The Union proposed that the LOU only applies to tax-related letters of reprimand involving willful § 1203 violations. The Agency proposed that the increased retention time will apply to any tax-related letter of reprimand and not merely those involving untimely filings or understatement of tax liability. The Agency further asserted that its proposal is consistent with the original notice provided to the Union; that is, to extend the retention time for letters of reprimand concerning § 1203 and tax-related matters. The Panel ordered the parties to adopt the Agency's proposal because it better captures the scope of the change as originally announced to the Union.

3. Retention Time in Personnel Files for Letters of Reprimand - The Union proposed that the Agency retain tax-related letters of reprimand for no more than 3 years in an employee's personnel file and the Agency proposed 5 years. The Agency asserted that a 5-year retention period is necessary because it would promote an appropriate progressive disciplinary policy. According to the Agency, infractions committed within two years of each other would not be available for consideration by the Review Board in an effective time frame because of the current backlog in the Tax Compliance Branch. The Panel ordered the parties' to adopt the Agency's final offer. The Panel found the Union's proposal does not appear to be long enough for retaining letters of reprimand in an employee's file for purposes of progressive discipline. According to the Panel, a 5-year retention period also is more consistent with the reality IRS faces in terms of the current backlog in reviewing employees' tax compliance and the built-in lag time concerning completeness of tax filing information.

4. Application of the New Policy - The Union proposed that the 3-year retention time for tax-related letters of reprimand only apply to employee returns filed after the effective date of the agreement because a new policy should not apply until employees are made aware of it and the significant impact the change may have should they fail to comply with their tax reporting requirements. The Agency proposed that the increased retention time apply to any tax-related letter of reprimand issued after the effective date of this agreement because immediate application of the change would promote the Agency's objective of placing complete and accurate information before the 1203 Review Board regarding an employee's past discipline. The Panel ordered the parties to adopt the Union's final offer. The Panel explained that fairness dictates that employees should be made aware of the change in policy before they are affected by it, particularly in circumstances where the consequences to their careers are potentially significant.

5. Information Provided to the Union - The Union proposed that the Agency provide, on an annual basis: (1) a report on employees with multiple tax offenses containing such information as permanent/seasonal status and EEO data (race, age, national origin, gender and disability status), and (2) the raw data as to compliance trends and adverse impact on protected Title VII cases and lower graded employees. The Agency proposed that the agreement not contain any additional requirement to provide information to the Union other than what the parties have already agreed to, which is a report on employees with multiple tax offenses containing the following information: ALERTS case number, case year, employee services, grade, job title division location, case issue code, proposed disciplinary action, and imposed disciplinary action. The Agency argued that any additional information should be sought under the provisions of the Statute. The Panel ordered the Union to withdraw its proposal, finding that 5 U.S.C. § 7114 (b) (4) of the Statute is sufficient to meet the Union's legitimate interests.

6. Training Employees on Tax Compliance Matters - The Union proposed that the Agency make reasonable efforts to ensure that an employee with at least one current tax-related offense since 2002 has completed the annual ethics briefing within a reasonable period of time following implementation of this initiative. The Agency asserted that all IRS employees already receive annual ethics training at a predetermined time each year, and additional steps to ensure that employees are in compliance with their tax filing requirements are unnecessary. The Panel ordered the Union to withdraw its proposal. The Panel stated that requiring the Agency to communicate the change, and why it is necessary, consistent with the Panel's Order, would be more effective in helping employees avoid tax-related offenses.

06 FSIP 127  
April 9, 2007

[Dep't of the Army, U.S. Army Communications-Electronic Research, Development and Engineering Center, Fort Monmouth, New Jersey and Local 476, NFFE, Federal District 1, IAM&AW, AFL-CIO.](#)

The impasse before the Panel concerned the Agency's proposal to implement a personnel demonstration project (demo project) for a 2-year trial period. The Union maintained that the Panel should decline to retain jurisdiction over this issue because there is no statutory requirement for the Union to negotiate over the Agency's proposal. The Union asserted that whether a demo project is a mandatory subject of bargaining is a matter that the FLRA has yet to address. Moreover, the Union contended that, under 5 U.S.C. § 4703 (f)(1), a demo project may not be implemented where it would violate an existing CBA, as would be the case here because it would create a new personnel system that contravenes position description and incentive award provisions contained in the parties' current agreement. The Agency explained that the demo project would depart from the traditional personnel system in the areas of pay banding, pay for performance, and recruitment initiatives and that it is intended to foster the effectiveness of the Agency's laboratory through a more flexible and responsive personnel system designed to aid in the recruitment, development, retention and motivation of a high quality workforce. The Panel ordered the parties to adopt the Agency's proposal. Regarding the jurisdictional arguments, the Panel concluded the Union misinterpreted the meaning of 5 U.S.C. § 4703 (f). According to the Panel, the record establishes that the parties are bargaining over a new collective bargaining agreement, and that all of the provisions in the prior agreement are open for negotiations, thereby making the Agency's decision to propose the demo project appropriate. The Panel also found that the Union had not cited any case law in support of its position that a demo project is a permissive subject of bargaining for the Union. Regarding the merits of the demo project, the Panel was "persuaded" that its implementation would provide the Agency with certain flexibilities concerning pay and awards that may attract new hires for its operations and help retain highly qualified employees who otherwise would not be inclined to relocate to a new geographic area.

07 FSIP 33  
April 9, 2007

[Dep't of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Beaumont, TX and Local 1010, AFGE, AFL-CIO.](#)

The impasse before the Panel concerned whether the Agency's decision to terminate a 4/10 compressed work schedule (CWS) for employees who supervise inmates in the facility's factory is supported by evidence that the schedule is causing an adverse agency impact. The Agency contended the schedule is increasing costs and diminishing the level of service the Agency is furnishing to the public. The Agency explained that the parties' 2002 CWS Memorandum of Understanding (MOU) established a 6:30 a.m. inmate starting time in order to accommodate the 6 a.m. starting times of employees on the CWS. As a result, according to the Agency, while events outside the parties' control recently have pushed inmate starting times closer to 7 or 7:15 a.m., any starting time before 7:30 a.m. to accommodate the CWS requires the unnecessary payment of overtime to inmates. Finding that the CWS is causing an adverse agency impact by increasing the cost of agency operations, the Panel ordered it to be terminated. The Panel found that any work performed before 7:30 a.m. to accommodate the CWS starting time of 6 a.m. requires the Agency to pay inmates at the applicable overtime rate, and that the factory's current production requirements can be met without incurring such payments.

07 FSIP 20  
April 10, 2007

[Dep't of Agriculture, Farm Service and Risk Management Agencies, Washington, D.C. and Local 3925, AFSCME, AFL-CIO.](#)

The parties negotiated over a successor collective bargaining agreement and the impasse before the Panel concerned whether to retain a provision of the current agreement that permits employees to earn credit hours without supervisory approval, yet allows supervisors the right to determine which work is appropriate for employees to earn credit hours. The Union proposed to retain the provision but add wording that would promote greater communication between the employee and the supervisor as to when the employee intends to work credit hours. The Agency proposed that employees must receive supervisory approval to work credit hours, arguing that this decision falls within management's right to assign work under § 7106(a)(2)(B) of the Statute and that an agency may establish limitations on how credit hours are earned under 5 U.S.C. § 6122(b) of the Federal Employees Flexible and Compressed Work Schedules Act. The Agency further asserted that its proposal allows supervisors greater opportunity to manage the work and eliminates the ambiguity of the current provision that has resulted in numerous grievances. The Panel rejected the Agency's management right and Work Schedules Act claims because alternative work schedules are fully negotiable and the Agency head did not claim that a schedule involving the

accumulation of credit hours is substantially disrupting the Agency's ability to function or is causing additional costs to be incurred. Nevertheless, the Panel ordered the parties to adopt the Agency's final offer. The Panel determined that requiring supervisory approval before employees work credit hours would allow supervisors to better manage the work, eliminate the ambiguity in the current contract provisions that has generated grievances, and still give employees a measure of control over their workloads by allowing them to initiate requests for earning credit hours. The Panel also stated that this requirement is in accordance with the most recent guidance to agencies issued by OPM.

### MERIT SYSTEMS PROTECTION BOARD DECISIONS

PH-0752-06-0546-I-1  
March 26, 2007  
2007 MSPB 89

*Lizzio v. Department of the Army*. The Board upheld the Last Chance Agreement (LCA) provision waiving Board appeal rights and dismissed the appeal for lack of jurisdiction. The Board concluded that it is free to rely on a different ground than the agency did in determining whether the appellant established by a preponderance of the evidence that he complied with the LCA. The agency found the appellant's conduct to be a violation of an army regulation requiring employees "maintain the highest standards of personal conduct and professionalism to . . . [a]void embarrassment to the Army and the Government." The Board did not find it necessary to determine whether the appellant violated the Army regulation. Instead, it concluded that his rude and discourteous behavior toward members of the public constitutes misconduct, and was a violation of his LCA.

PH-0752-06-0605-I-1  
March 26, 2007  
2007 MSPB 86

*Horton v. Department of the Navy*. The Board held that under the unique circumstances of this case, and contrary to the initial decision, the appellant cannot reasonably be found to have constructively received the agency's decision notice until the date on which he actually received the notice, July 5, 2006, and not the earlier date of June 16, 2006, on which the notice was delivered to his residence. The appellant stated without contradiction that the notice was delivered to a rooming house where he was staying temporarily, that he "has no relationship" with the person who signed the receipt for the notice, that he authorized no one to accept mail deliveries on his behalf, and that he did not even provide the rooming house address to the agency as a mailing address. The appellant presented evidence that he was out of town from June 8 until July 5. The record did not suggest the appellant made any attempt to avoid receiving the decision notice on a timely basis. Based on the date the appellant actually received the agency notice, the Board held that his appeal was timely and remanded the case back to the regional office for adjudication.

DA-0752-06-0193-I-1  
April 6, 2007  
2007 MSPB 97

*Foret v. Department of the Army*. The Board, still sustaining the agency's action, determined the agency erred in applying its procedures when it suspended the appellant for refusal to take a drug test ordered by the commander and not, as required by the agency's regulation, ordered by the appellant's first- or second-line supervisors. The appellant failed to show this error was harmful. There was no statement or testimony that if the agency had followed applicable procedures it would not have suspended him. Further, there was no evidence regarding whether the appellant had other supervisors who could have initiated the test, and whether they would not have done so under the circumstances.

### FEDERAL CIRCUIT COURT DECISION

Fed. Cir. No. 3004,  
MSPB Docket No.  
NY-3443-06-0084-I-1  
March 26, 2007

*Tully v. Department of Justice*. The Court denied relief to the appellant on his claim for payment for 27 holidays which occurred while he was on leave without pay during his military service. The appellant's primary argument was that the agency's failure to pay him for holidays violated his rights under 38 U.S.C. § 4316(b)(1)(B) because the agency provided holiday pay to employees who took paid leaves of absence to attend judicial proceedings as jurors or witnesses and therefore was obligated to provide holiday pay for him while he was on leave for military service. The Court held that Section 4316(b)(1) entitles service members to benefits (such as holiday pay) equivalent to those the agency provides to non-service members who are absent for a comparable length of time. The absence for court duty is typically of brief duration, whereas the appellant had a two and a half year absence for active service in the Army.