



## U.S. MERIT SYSTEMS PROTECTION BOARD

### **Case Report for March 16, 2018**

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#### **COURT DECISIONS**

##### **PRECEDENTIAL:**

**Petitioner:** Scott Holton

**Tribunal:** U.S. Court of Appeals for the Federal Circuit

**Case Number:** [2017-1430](#)

**Docket Number:** PH-0752-15-0475-I-1

**Issuance Date:** March 9, 2018

**Adverse Action Charge**

**-Illegal Drug Use**

**Harmful Error**

The appellant was a Rigger Supervisor for the Department of the Navy (Navy). On March 11, 2015, he oversaw a crane team when an accident occurred in which a crane struck a building, causing approximately \$30,000 in damage. On the evening of the accident, the agency orally informed all of the members of the crane team, including the appellant, that they would be drug tested due to the severity of the accident. The appellant took the drug test, which tested positive for marijuana. Two days after the appellant provided his urine sample for the drug test, the Navy issued a written notice informing him that the reason for the drug test was the accident. On May 15, 2015, the Navy proposed his removal. After affording him an opportunity to respond to the proposal, the Navy removed him, effective July 8, 2015.

On appeal to the Board, the administrative judge affirmed the appellant's removal. The administrative judge found that the Navy had properly selected the appellant for drug testing, given that he was the first-line supervisor of the employees operating the crane at the time of the accident. The administrative judge further found that the drug test was valid and the Navy had established its charge of illegal drug use. Finally, the administrative judge rejected the appellant's affirmative defense of harmful procedural error, finding that the Navy's failure to provide the appellant with advance written notice of the reason for the test was a harmless error that did not change the outcome of the test. On review, the Board affirmed the initial decision.

**Holding:** The Court affirmed the Board's decision to uphold the appellant's removal. The Navy was justified in requiring the appellant to submit to drug testing because it had a reasonable suspicion that the appellant, through his actions or inactions, contributed to the accident where he instructed the team immediately before the accident and was still actively involved in the operation when the accident occurred. The Court rejected the appellant's argument that he did not receive adequate written notice of the drug test. The Fourth Amendment imposes no such requirement. The Navy's failure to provide advance written notice in accordance with its regulation was not harmful error because the purpose of the notice requirement is not to provide an opportunity to challenge the propriety of the test, but rather to ensure that the employee will be present at the drug test and be able to request deferral under appropriate circumstances.

**Petitioners:** Federal Education Association-Stateside Region and Karen Graviss

**Tribunal:** U.S. Court of Appeals for the Federal Circuit

**Case Number:** [2015-3173](#)

**Docket Number:** 14-1024-00182-7

**Issuance Date:** March 13, 2018

On October 13, 2017, the Court granted a rehearing en banc in this case concerning a petition for review of an arbitrator's decision. On March 8, 2018, the parties presented oral argument on the issue of timeliness and, in particular, when the decision of an arbitrator "issues" within the meaning of 5 U.S.C. § 7703(b)(1). On March 13, 2018, the Court ordered the parties to file supplemental briefs to address the Court's jurisdiction under 5 U.S.C. § 7703(b)(1) and also invited amici curiae to submit amicus briefs on this issue.

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