Date: January 12, 2006

Claimant: [name]

File Number: 05-0036

OPM Contact: Robert D. Hendler

The claimant formerly occupied a [position] with Department of the Navy, Naval Criminal Investigations Service. In her initial letter dated March 21, 2005, she requested that the U.S. Office of Personnel Management (OPM) make a "determination" as to whether she is "entitled to Court Leave." The attachments to her letter included correspondence with the Office of Special Counsel (OSC) in which the claimant challenged her agency's refusal to grant her court leave since July 2004 and in which she indicated that she had filed an appeal with the Merit Systems Protection Board (MSPB). Contacts with the appellant's then employing agency revealed that the MSPB case concerning the claimant's placement in a leave without pay status was dismissed for lack of jurisdiction on February 7, 2005. The record shows that the claimant was subsequently removed from Federal employment effective June 29, 2005, and had filed an appeal with MSPB in which court leave was an underlying issue.

Because of jurisdictional issues, we awaited MSPB action. On September 9, 2005, the claimant's appeal of her removal was dismissed without prejudice. The decision states, in part:

> By motion dated September 8, 2005, the appellant asked that I delay adjudication of her appeal until after the Office of Personnel Management (OPM) issues its determination on her pending claim of entitlement to court leave pursuant to 5 U.S.C. §6322….
>
> The parties and I discussed this matter during a September 8, 2005 teleconference, and the agency's representative voiced no objection to the appellants request….
>
> If OPM finds that the appellant was entitled pursuant to statute to court leave for the entire period at issue in this appeal, the underlying basis for the agency's charges and the appellant's removal might be obviated. Consequently, in the interests of fairness and judicial economy, I have determined that the appellant's request has merit, and the instant appeal should be dismissed without prejudice to the appellant.

We received the agency's claim administrative report on November 3, 2005, and supplementary information on November 10, 2005. In response to the claimant's e-mail request of November 10, we afforded her two additional weeks to comment on the agency's administrative report. We received an electronic copy of her response to the agency's administrative report on November 25, 2005. For the reasons discussed herein, the claim is denied.

The claimant and the agency submitted voluminous information on the events related to her claim for court leave. OPM's authority to adjudicate compensation and leave claims flows from 31 U.S.C. §3702, is narrow, and is limited to adjudication of compensation and leave claims. This section of law does not include any authority to render decisions on claimed violations of merit system principles (MSPs) or the committing of prohibited personnel practices (PPPs) that led the claimant to seek assistance from OSC or other matters under the jurisdiction of MSPB. Therefore, OPM may not rely on 31 U.S.C. §3702 as a jurisdictional basis for considering such issues within the context of the claims adjudication function that it performs under §3702.

The issue before us is whether the agency was obligated to grant court leave under 5 U.S.C. §6322(a) to the claimant because she was summoned to serve on the Ventura County, California, civil grand jury as a hold over from the July 1, 2003, through June 30, 2004, term for the July 1, 2004 through the June 30, 2005, term. The Ventura County Grand Jury Web site and publications show that membership is voluntary. The cover of the grand jury brochure states "Interested Citizens Are Urged to Apply." A February 18, 2003, letter to prospective grand jurors states, in part:

> You have expressed an interest in serving on the Ventura County Grand Jury. The Ventura Superior Court is now accepting nominations and applications of qualified persons who will serve the county in this highly visible and responsible local government oversight capacity. The term of service is for the fiscal year of July 1, 2003-June 30, 2004….
>
> If you are employed, it is **ESENTIAL** that you discuss Grand Jury service with your employer, to determine whether such service would be compensated or even permitted….From the applications submitted, judges of the superior court will select a final panel of 30 nominees….
>
> On Tuesday, July 1, 2003, the 19 members of the 2003-4 Grand Jury will be drawn by lot from the panel of 30. The remaining 11 panel members will serve as alternates….
>
> We appreciate your interest in the program and are looking forward to receipt of your completed questionnaire.

In her March 21, 2005, letter to OPM, the claimant states that:

> …in years past, I was aware that employees were considered entitled to court leave even after their management ordered them to resign or refrain from serving. The reason given in those past instances was that 5 U.S.C. §6322 states that an

> employee is entitled, and that entitlement cannot be ordered away by a supervisor. While 5 U.S.C. §6322 may have undesirable consequences for an agency, it does not result in absurd consequences. In addition, the legislative history of 5 U.S.C. §6322 argues that the intent of the statute was to encourage participation in the judicial process.

The claimant's rationale quotes Matter of *C. Robert Curran*, B-217845, September 18, 1985:

> …it appears that when an individual is summoned, the statute entitles him to court leave, regardless of whether he may be excused from jury duty because of the distance he must travel or for some other reason. We have recognized that an employee's failure to advise the court of an applicable exemption from the requirement to perform jury service does not defeat his entitlement to court leave. 27 Comp.Gen. 83, 89 (1947). A review of the relevant legislative history shows that the statute was meant to encourage participation in the judicial process. It does not limit court leave to jury service in the vicinity of one's permanent duty station but authorized leave for jury service in connection with any judicial proceeding.

In her March 2, 2005, letter to OSC, responding to OSC's letter of February 16, 2005, the claimant states:

> ….5 U.S.C. §6322 entitles employees without a loss of pay when they are summoned to jury duty. You added that this was not applicable when they volunteer and are then summoned for jury duty. However, I can find no reference to your additional limitation on volunteering….
>
> In June of 2004, I consulted with two attorneys independently to obtain an opinion of this law. Both attorneys stated to me that interpretation and application of the law would depend on the wording of the law as written and might depend on precedent established in past cases. I was told that, when a legislative text has plain meaning, the courts are prohibited from interpreting it. They are bound by the words of the text. Each of the attorneys believed that 5 U.S.C. §6322, as written, does not have a restriction on volunteering versus not volunteering.
>
> I was informed that, in a recent U.S. Supreme Court opinion, it held that an agency's interpretation of statute is entitled to deference only if the interpretation was pursuant to congressionally delegated authority. We understand it is possible that NCIS or OSC has congressionally delegated authority to interpret this statute. We would like additional information on the authority.

In a November 8, 2005, e-mail to OPM on this matter, the claimant stated:

> Obviously, the recently-suggested prohibition against volunteering for jury service has not been applied in past California civil grand jury service. I have requested the source for these unprecedented constraints on 5 U.S.C. §6322. I

> have consistently felt that if the Agency had sought advice from OPM earlier in the discussion we might not have reached this point.

The agency rationale to deny the claim consists of two arguments. The first is that 5 U.S.C. §6322 is not applicable to voluntary service on the Ventura County Grand Jury. The second is that the civil grand jury is not a "judicial proceeding" within the meaning of 5 U.S.C. §6322. With regard to the first argument, the administrative report states that:

> [Claimant] applied to serve on the 2003-2004 Ventura County grand jury and was selected to serve. {Claimant] did not provide the Agency with any prior notice of her intention to volunteer…Once the Agency learned of her grand jury service, the Agency requested that the Superior Court release her from service….[the] Presiding Judge…advised NCIS that [claimant] take no action on the NCIS' request for her release from grand jury service and therefore, Judge Clark declined to release [claimant]. However, Judge Clark stated that "**since Grand Jury service is completely voluntary, please be assured that the Court will approve any request by [claimant] to resign from her duties on the Grand Jury.**" (Emphasis added).

With the regard to the grand jury term that is at issue in this claim, the agency stated:

> After allowing her to serve one full year…NCIS management directed [claimant] that she was not to extend her service or apply for a second term….Further, DAD Vann specifically directed [claimant] was not to seek or accept appointment for a second term on the Ventura County civil grand jury.

The agency report contains a copy of a June 28, 2004, letter from the claimant to Mr. Joseph W. Vann, Deputy Associate Director for Computer Investigations, NCIS, which states, in part:

> This letter is to inform you that I will be serving a final year on the Ventura County Grand Jury beginning on July 1, 2004, and ending on June 30, 2005.
>
> In my recent contact with OPM I was informed that as a summoned and sworn juror I am entitled to court leave (5 U.S.C. §6322). I was also informed that the employer cannot supercede this entitlement by "directing" or "ordering" an employee not to serve on a jury. I understand that any such a direction or order can be challenged and found invalid, and any disciplinary action taken on such an order would be legally reversed.
>
> If you have any additional clarifying information or if you have been advised of legal authority to deny court leave, please provide the specific details.

The agency rationale discusses, at length, the distinction that it sees between the voluntary nature of Ventura County civil grand jury, including its empanelment process, and the random selection process for empanelling petit juries and:

> "a second Grand jury whose sole function is to perform the criminal indictment process. **The member of the second grand jury will be selected from the pool of candidates that support the petit jury**. (Emphasis added).

The agency points out that service is required on both petit and "second grand juries." In its rationale, the agency asserts that given the "unique" nature of the Ventura County voluntary civil grand jury: "The issuance of a summons is not controlling. 5 U.S.C. §6322(a) is not controlling."

The pertinent part of the statute at issue states:

> Sec. 6322. Leave for jury or witness service; official duty status for certain witness service
>
> (a) An employee as defined by section 2105 of this title (except an individual whose pay is disbursed by the Secretary of the Senate or the Chief Administrative Officer of the House of Representatives) or an individual employed by the government of the District of Columbia is entitled to leave, without loss of, or reduction in, pay, leave to which he otherwise is entitled, credit for time or service, or performance of efficiency rating, during a period of absence with respect to which he is summoned, in connection with a judicial proceeding, by a court or authority responsible for the conduct of that proceeding, to serve--
>
> (1) as a juror; or
>
> (2) other than as provided in subsection (b) of this section, as a witness on behalf of any party in connection with any judicial proceeding to which the United States, the District of Columbia, or a State or local government is a party;
>
> in the District of Columbia, a State, territory, or possession of the United States including the Commonwealth of Puerto Rico or the Trust Territory of the Pacific Islands. For the purpose of this subsection, ``judicial proceeding" means any action, suit, or other judicial proceeding, including any condemnation, preliminary, informational, or other proceeding of a judicial nature, but does not include an administrative proceeding.

As noted by the claimant, it is well settled that "[t]he starting point for interpretation of a statute is the language of the statute itself," and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 835, 110 S. Ct. 1570, 1575 (1990), citing Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108, 100 S. Ct. 2051, 2056 (1980).

At issue in the instant case is the meaning of the word "summoned." In her November 23, 2005, response to the agency's administrative report, the claimant points to the definition of "summons" in 28 CFR 21.1(f): "An official request, invitation or call, evidenced by an official writing of the court, authority, or party responsible for the conduct of the proceeding." However, this definition is neither referenced by nor incorporated into 5 U.S.C. §6322 and, thus, is not controlling in the present case. This citation undermines the claimant's assertion that the term "summoned" is clear and unambiguous within the context of the court leave statute since that statute does not contain a definition of "summoned." The Comptroller General decisions cited by her do not address the definition of "summoned" and, therefore, are not germane to the resolution of this issue. Black's Law Dictionary, Deluxe Seventh Edition, defines the verb "summon" as "To command a person to appear in court." WordNet provides four definitions for the verb "summon." The first is "call in an official matter, such as to attend court." The second definition in Webster's Third New International Dictionary of the English Language Unabridged (1968) is "to command by service of a summons or other statutory notice to appear in court." The court leave law does not stipulate precisely what "is summoned, in connection with a judicial proceeding" means since it also covers more than traditional court trial proceedings.

The agency refers to and provides a copy of Senate Report No. 91-1371, November 24, 1970, amending the court leave statute to include "periods of time when an employee is appearing as a witness in a judicial proceeding on behalf of a state or local government." The report states:

> It should be emphasized that an employee would be entitled to witness leave only if he is summoned by the court or authority responsible for the conduct of the proceeding. The employee would not be entitled to leave if he just volunteered; He must be summoned….What is intended is that the summons is an official request, invitation, or call, evidenced by an official writing.

The agency asserts that this understanding extends to volunteering for jury duty.

The statute at issue was initially enacted on June 29, 1940. The 1940 Congressional Record Index shows that the purpose of H.R. 6507 was:

> To provide for leave of absence with pay, for any employee of the United States or the District of Columbia who may be called upon for jury service in any State court or court of the United States.

Thus, the party initiating the process was expected to be a State or Federal court. This expectation was made clear in the Senate Committee on Civil Service Report (76th Congress, 3d Session, Report No. 1866) in the June 23, 1939, endorsement by the then U.S. Civil Service Commission:

> Although employees of the Government are in a number of jurisdictions exempt from jury service, the Commission believes that in those States where jury duty is **compulsory** (Emphasis added) employees of the Government should be permitted to serve without loss of compensation or leave, and accordingly recommends favorable consideration of H.R. 6507.

Later amendments to 5 U.S.C. §6322 have not changed or modified this underlying premise and purpose.

Another underlying principle of statutory construction is that laws *in pari materia,* or upon the same subject matter, must be construed with reference to each other and should be interpreted harmoniously. *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990); *United States v. Freeman*, 44 U.S. (3 How.) 556, 564-566 (1845); *Alexander v. Mayor and Commonality of Alexandria*, 9 U.S. (5 Cranch) 1, 7-8 (1809). This assumes that, when Congress passes a new statute, it is aware of all previous statutes on the same subject. *Erlenbaugh v. United States*, 409 U.S. 239, 243-244 (1972**).**

Enacted as part of the Civil Service Reform Act of 1978, 5 U.S.C. §7106 states:

> Sec. 7106. Management rights
>
> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--
> (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
> (2) in accordance with applicable laws--
> (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
> (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

If the claimant's interpretation of 5 U.S.C. §6322(a) were to stand; i.e., that an employee is entitled to seek voluntary service on a grand jury in contravention of a direct management order to refrain from doing so, then management's enumerated right to assign work would be rendered superfluous and unenforceable. Harmonious interpretation of 5 U.S.C. §6322(a) and §7106 (2)(B) reinforces our conclusion that the claimant is not entitled to court leave for her voluntary grand jury service for the period of her claim. Since the congressional purpose of juror court leave was to preserve the compensation of Federal employees compelled to be absent from their jobs in order to perform a civic duty, it is clear that Congress did not intend to allow employees to commit to the expenditure of funds from the public fisc by volunteering for jury duty. The summons resulting from this voluntary action does not meet the intended meaning or purpose of a compulsory summons at the heart of 5 U.S.C. §6322(a). Because the claim may be resolved on the basis of the meaning of "summoned," there is no need to and, therefore, we will not address the issue of what constitutes a "judicial proceeding" in this settlement.

This settlement is final. No further administrative review is available within the OPM. Nothing in this settlement limits the claimant's right to bring an action in an appropriate United States Court.