

Number 159, January-February 2005:

Waiving the Fee for Filing a USERRA Appeal

By Mathew B. Tully, Esq.

In a matter of first impression, the United States Court of Appeals for the Federal Circuit applied a provision of 38 USC 4323, which is entitled “Enforcement of rights with respect to a State or private employer” to federal employees. The United States Court of Appeals for the Federal Circuit is a specialized federal appellate court, one step below the U.S. Supreme Court. It is on the same level as the numbered Circuit Courts (First Circuit through Eleventh Circuit) and the United States Court of Appeals for the District of Columbia Circuit. The Federal Circuit was created in 1982 from the merger of the former United States Court of Claims and the United States Court of Customs and Patent Appeals. Instead of having a geographic jurisdiction, like the other circuit courts, the Federal Circuit has a jurisdiction based on subject matter, including the review of final decisions of the Merit Systems Protection Board (MSPB).

By letter dated December 2, 2004 (available on the ROA Web site), the court clerk announced that the appellant in Berrios v. United States Department of Justice, Federal Circuit docket number 05-3034 (an appeal involving issues discussed in Law Review 151), is not required to pay any court costs or fees associated with her filing of a notice of appeal from a final decision of the MSPB. The court clerk also thanks me for making the court aware of this section of the law and its applicability to this appeal.

Before this determination, federal employees alleging violations of USERRA were required to pay at least \$250 in court costs to appeal a decision of the MSPB. It is still unclear whether appellants who have previously paid these fees will receive a refund or whether appellants who had their cases dismissed for failing to pay will have the appeals restored to the calendar.

This determination to waive the fee for filing a USERRA appeal is expected to be reflected in the Federal Circuit's rules in the very near future. This determination also should increase the number of USERRA appeals heard by the Federal Circuit.

Mr. Tully is an ROA Life Member and is serving as a captain in the New York Army National Guard. He is the president and founder of Tully & Associates, P.L.L.C., in Albany New York. The firm's Web site is: www.tullylegal.com.

* Military title used for purposes of identification only. The views expressed herein are the personal views of the authors and should not be attributed to the U.S. Marine Corps, the Department of the Navy, the Department of Defense, or the U.S. government. The best way to reach Captain Wright is by e-mail, at samwright50@yahoo.com.