

The Fifty-Nine-Minute Rule: White Christmas, Gray Area?

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*This is their holiday treat . . . There is nothing so simultaneously yearned for and ridiculous as the email invoking the 59 minute rule. We do not take this rule lightly. I am told there have actually been debates regarding the authority . . . to invoke the 59 Minute Rule . . . I was too busy leaving at the time to notice.*¹

Introduction

Good-natured federal managers have long used the so-called fifty-nine-minute rule to excuse brief absences by their civilian employees and to release them from duty early for almost any acceptable reason.² The authority for doing this at taxpayer expense, however, is unclear. One will not find a fifty-nine-minute rule in statutes or federal regulations, yet its use and affect on morale are undeniable.³ In a workforce embracing change, supporting a war, and facing a large scale restructuring, morale can be pivotal. Even so, the caliber and commitment of federal employees might surprise many in the private sector. For the most part, these are not the caricature, clock-watching bureaucrats who sponge off of the American taxpayer and can never be fired.⁴ They are, instead, dedicated personnel responsible not only for their mission but for the sound stewardship of government resources.⁵ So what is it about giving them an hour off that evokes such sarcasm?

Some of this attitude, doubtless, is envy or even a twinge of guilt, but much of it may stem from concerns over the rule's propriety and appearance of propriety. As with many personnel rules, the origins of the fifty-nine-minute rule have been shrouded by time, leaving uncertainty over its status and scope.⁶ Newly proposed revisions to its vestigial foundations may further obscure its basis.⁷ The consequent ambiguity surrounding this time-honored tradition, ironically, can lead to its abuse and to litigation harmful to office morale⁸ yet, even during the season of its most prevalent invocation, few in our workforce seem to have a free hour in which to examine its validity. Thus, it seems appropriate to do so now.

This article will briefly examine the legal and regulatory authority behind particular categories of employee absences. Next, this article examines the origins and uses of the fifty-nine-minute rule, and some noteworthy administrative case decisions involving the rule and its underlying principles. Finally, this article identifies some useful parameters for the rule, including who may approve and receive such absences and when such authority may not be used. This article reveals that there is no government-wide fifty-nine-minute rule, as such. Instead, each agency has the authority to excuse brief absences, and such absences are not necessarily limited to fifty-nine minutes.

¹ TegWar, Why I Love My Job, Reason #59, The 59 Minute Rule, <http://www.tegwar.blogspot.com/> (Nov. 24, 2004).

² *Id.*; see also *infra* notes 113, 156, 161.

³ See, e.g., Matt's House of Nothing in Particular, Lowest of the Low, <http://www.mhonip.com/index.asp> (July 20, 2004) (evincing adverse impact on contractor employee morale when denied excused absence by a contractor, while co-located federal employees received it) (on file with author).

⁴ This comment is based on the author's professional experiences as an Attorney-Advisor with the Office of the Judge Advocate, HQ, U.S. Army Europe & Seventh Army, and at various other U.S. Army legal offices in Germany from December 1983 through the present, especially in regard to Europe-based civilian support of various operations during that period.

⁵ See U.S. DEP'T OF DEFENSE, REG. 5500.7-R, THE JOINT ETHICS REG. para. 2-301b (Aug. 1993) [hereinafter DOD REG. 5500.7-R].

⁶ See, e.g., *supra* note 1 and accompanying text.

⁷ 70 Fed. Reg. 1072 (5 Jan. 2005) (proposing a change to be codified at 5 C.F.R. § 630.209 that would limit agency minimum leave charge to either six or fifteen minutes).

⁸ See, e.g., *Weber v. Dep't of Navy*, 100 F.M.S.R. 80434 (Jan. 18, 2000) (examining, inter alia, whether a selective release of workers under a fifty-nine-minute rule was an abuse of managerial discretion or was otherwise unlawful) (on file with author); see also *Pillard v. U.S. Postal Service*, EEOC No. 05880844, 89 FEOR 23181 (Jan. 24, 1989) (upholding a decision to reinstate a discrimination complaint over the denial of a fifty-nine minute early release from work, and noting that if unlawful discrimination was found, the employee would be entitled to fifty-nine minutes of administrative leave to use at her discretion as a "make whole" remedy).

Administrative Leave

Congress has established a basic federal workweek of forty hours, and U.S. taxpayer dollars fund civil service salaries based on this workweek.⁹ To help ensure U.S. taxpayers get what they pay for, federal agencies must maintain “an account of leave for each employee in accordance with methods prescribed by the General Accounting Office [GAO, now Government Accountability Office].”¹⁰ Hence, civil service employees must remain in some authorized status during the workweek.¹¹ These include duty status, absences without pay, and various forms of leave.¹² The authority to excuse civilian employees from duty is statute-predicated and often specifically regulated.¹³ Unlike their military counterparts, civil servants are not authorized passes, training holidays, or permissive temporary duty.¹⁴ Administrative leave is the closest authorized status to these military absences.¹⁵

Administrative leave is not specifically recognized in statute or federal regulation.¹⁶ The power of federal agencies to grant it, nonetheless, derives from broad statutory authority to regulate their workforces.¹⁷ Because granting administrative leave entails a paid absence without a charge to other paid leave, its use is not without restriction.¹⁸ Comptroller General decisions and Office of Personnel Management (OPM) guidelines¹⁹ limit grants of administrative leave to situations involving brief absences,²⁰ though these sources do not specifically define the meaning of “brief.”²¹ Based upon various agency personnel manuals, administrative leave can range in duration from minutes to days depending on the specific purpose of the leave and how it supports an agency’s mission.²² For lengthy absences, “administrative leave is not

⁹ 5 U.S.C. §§ 6101, 5504 (2000); *see also* 5 C.F.R. § 550.103 (2006).

¹⁰ 5 C.F.R. § 630.101 (2006). The GAO was renamed in 2004.

¹¹ *See* U.S. DEP’T OF DEFENSE, REG. 7000.14-R, FINANCIAL MANAGEMENT REG. vol. 8, ch. 2, para. 020206A (Jan. 2006) [hereinafter DOD REG. 7000.14-R] (stating that “[g]enerally, a full-time employee’s basic work requirement is 80 hours in a pay period Attendance and absence must be recorded consistent with the status in which employed”). The former Army regulation on this point noted “[g]enerally, there must be legal or regulatory authority for an absence from duty during the basic workweek to be excused without charge to leave.” U.S. DEP’T OF ARMY, REG. 690-990-2, HOURS OF DUTY, PAY, AND LEAVE, ANNOTATED bk. 630, para. S11-1 (15 May 1985, obsolete) [hereinafter AR 690-990-2 (obsolete)].

¹² 5 U.S.C. § 6302(b) (providing that “an employee is deemed employed for a full biweekly pay period if he is employed during the days within that period, exclusive of holidays and nonworkdays established by Federal statute, Executive order, or administrative order, which fall within his basic administrative workweek”). The term “administrative order” is not defined in Office of Personnel Management (OPM) regulation and may comprise a simple e-mail from an acting branch head. Office of Personnel Management Compensation and Leave Decisions, No. S002609 (May 25, 1999), *available at* <http://www.opm.gov/payclaims/1999/S002609.htm>.

¹³ U.S. Office of Personnel Management, Index of Laws, Regulations, and other References Related to Leave Administration, <http://www.opm.gov/oca/leave/HTML/LEVINDEX.asp> (last visited Feb. 24, 2006); *see, e.g.*, 5 C.F.R. § 610 subpt. C; 5 C.F.R. § 630.206 (2006).

¹⁴ *See generally* U.S. DEP’T OF ARMY, REG. 600-8-10, LEAVES AND PASSES ch. 5 (31 July 2003) (regarding passes and permissive temporary duty or PTDY); United States Army Europe and Seventh Army Public Affairs Office, Federal and Training Holidays, <http://www.hqusareur.army.mil/USAR EURTrainingHolidays.htm> (last visited Feb. 24, 2006) (explaining, “[t]raining holidays . . . provide for an extended weekend. Military personnel are not required to take leave These are not paid holidays for civilians, however.”).

¹⁵ *See* GENERAL ACCOUNTING OFFICE, OFFICE OF GENERAL COUNSEL, CIVILIAN PERSONNEL LAW MAN., GAO/OGC-96-6, tit. II, ch. 5, para. A 1 (Mar. 1996), *available at* <http://www.gao.gov/special.pubs/og96006.txt> [hereinafter GAO PERSONNEL LAW MAN.] (observing that administrative leave is recognized neither in legislation nor in executive regulation). Because “[t]here are no OPM regulations covering administrative leave” agencies and departments are substantially free to determine its appropriate use. *Id.*

¹⁶ *Id.*; *see also* Excused Absence for Bar Examination Preparation, B-156287, 1975 U.S. Comp. Gen. LEXIS 2447, *2 (Feb. 5, 1975).

¹⁷ Derived, for example, from 5 U.S.C. §§ 301, 6104, 6302(a), and defined in agency regulations.

¹⁸ *See generally* U.S. DEP’T OF DEFENSE, MAN. 1400.25-M, DEPARTMENT OF DEFENSE CIVILIAN PERSONNEL MAN. SC610, SC630 (Dec. 1996) [hereinafter DOD MAN. 1400.25-M] (noting also that “Time-off awards shall not be granted to create the effect of a holiday or treated as administrative excusals or leave; i.e. they shall not be granted in conjunction with a military . . . “training” day or the like.”). For nonappropriated fund employees, excused absence rules include time-off awards. The awards are recorded as administrative leave and may be used to recognize groups but the contribution of each member still should be consistent with the intent of Army awards policies. U.S. DEP’T OF ARMY, REG. 215-3, NONAPPROPRIATED FUNDS PERSONNEL POLICY paras. 5-45b, 9-1a, 9-1d, 9-8d (29 Aug. 2003).

¹⁹ *See* General Accounting Office Act of 1996, Pub. L. No. 104-316, 110 Stat. 3826 (amending 31 U.S.C. § 3702). The Comptroller General resolved leave appeals and inquiries until the OPM assumed this role in 1996.

²⁰ DOD MAN. 7000.14-R, *supra* note 11, vol. 8, ch. 5, para. 051604; *see, e.g.*, Excused Absence for Bar Examination Preparation, 1975 U.S. Comp. Gen. LEXIS 2447, *2-3.

²¹ GAO PERSONNEL LAW MAN., *supra* note 15, tit. II, ch. 5:01 (summarizing Comptroller General decisions often including specifically sustained durations of administrative leave); *see also, e.g.*, AFGE, AFL-CIO, Local 3804 and FDIC, Madison Region, 1986 FLRA LEXIS 454, *56-58 (May 19, 1986) (providing a select summary of Comptroller General decisions on administrative leave time frames for various purposes).

²² *See* GAO PERSONNEL LAW MAN., *supra* note 15, tit. II, ch. 5:01, para. A 3; *see also* DOD MAN. 1400.25-M, *supra* note 18, SC630.7.4 (providing the following examples of the appropriate use of administrative leave: employment interviews; initial drug and alcohol counseling; certification for professional stature; certain management sponsored volunteer projects such as adopt-a-school; PCS in- and out-processing time; emergencies; physical examination for enlistment or induction, and for Congressional Medal of Honor holders to attend certain events). Authority exists for employees to participate in a cancer research effort three days per month using administrative leave. Dep’t of Housing and Urban Dev. Employee, B-156287, 1987 U.S. Comp. Gen. LEXIS 88

appropriate unless [it] . . . is in connection with furthering a function of the agency,”²³ a matter that is best evinced by a statute directly on point.²⁴ Further limits on administrative leave are left largely to agency discretion.²⁵ The Comptroller General has observed it would be appropriate for agencies even to set limits on the amount of administrative leave granted per employee, per time period, “i.e., not to exceed 4 hours in any one day; not to exceed 3 workdays; not to exceed 40 working hours in a calendar year, etc.”²⁶ Consequently, restrictions on the purpose and duration of administrative leave often are reflected in agency regulations, policies, collective bargaining agreements, and practices.

The OPM and the Department of Defense (DOD) have distinguished between two related types of administrative leave in distinct chapters of their regulations: administrative dismissals and excused absences.²⁷ Dismissals, in fact, are a form of excused absence.²⁸ Typically, dismissals involve groups of employees released from duty because of extraordinary circumstances, while other excused absences involve discretionary excusals, usually of individuals, to engage in activities consistent with agency policy.²⁹ To identify the authority for Army activities to exercise a fifty-nine-minute rule, one must first examine how the DOD further defines and restricts its use of these two types of administrative leave.

Administrative Dismissal or What the Fifty-Nine-Minute Rule Is Not

Agencies that distinguish between categories of administrative leave may, of course, establish distinct qualifying situations and approval levels for each category.³⁰ The DOD provides administrative dismissal authority for operation-disrupting circumstances largely beyond an agency’s control.³¹ Commanders and activity heads enjoy approval authority for installation level dismissals,³² but “[g]roup dismissals should be rare and authorized only when conditions are severe or normal operations would be significantly disrupted [and they] may not be used to create the effect of a holiday (to include activity down days and training days).”³³ The DOD’s dismissal rules not only require an approval authority to identify an emergency situation,³⁴ but also to consider the “practices of private employers in the area, the use of unscheduled leave in individual cases, and the severity of working or commuting conditions.”³⁵ Even then, only non-emergency employees are

(Dec. 11, 1987). Authority also exists for up to forty hours of excused absence during investigations of employees before a removal or suspension determination is made. Chairman, U.S. Civil Service Commission, B-135906, 1958 U.S. Comp. Gen. LEXIS 9238 (Sept. 11, 1958). *But see, e.g.*, Gilbert H. Dawson, B-176020, 1972 U.S. Comp. Gen. LEXIS 2016 (Aug. 4, 1972) (finding forty hours of administrative leave to represent an installation in a chess tournament was not appropriate). Further examples may arise in bargaining context. For example, a union, inter alia, sought bargaining on excused absence for “[c]onducting business with official offices and utility companies of the unit employee’s host nation, required because of the teacher’s status as a foreigner in the host nation.” Overseas Edu. Ass’n, Inc. and Dep’t of Defense Dependents Schools, 29 FLRA No. 61, sec. 12, proposal 10, art. 20 (Oct. 2, 1987). Reviewing the propriety of more lengthy absences, the Comptroller General also emphasizes whether leave is for some purpose connected to the employee’s work and, as with voting and blood donations, is for some civic purpose. Excused Absence for Bar Examination Preparation, B-156287, 1975 U.S. Comp. Gen. LEXIS 2447 (Feb. 5, 1975).

²³ Elmer DeRitter, Jr., B-207996, 1982 U.S. Comp. Gen. LEXIS 40561, *4 (Sept. 28, 1982); *see also* Chairman, U.S. Civil Serv. Comm’n, B-156506, 44 Comp. Gen. 643 (1965).

²⁴ *See, e.g.*, Adm., Fed. Aviation Agency, B-155580, 44 Comp. Gen. 333 (1964).

²⁵ GAO PERSONNEL LAW MAN., *supra* note 15, tit. II, ch. 5:0.1, para. A 1; *see* O. Medlin, Dep’t. of Air Force, B-179626, 1974 U.S. Comp. Gen. LEXIS 233, *1, *3-4 (Feb. 12, 1974). Agencies may administratively determine whether employees are to be charged leave for periods of less than one hour. M.E. Smith, B-175627, 1972 U.S. Comp. Gen. LEXIS 2149, *1 (July 5 1972).

²⁶ Federal Employees Providing Advice and Support to Fed. Credit Unions, B-212457, 1984 U.S. Comp. Gen. LEXIS 653, *7 (Aug. 23, 1984).

²⁷ *See* 5 C.F.R. §§ 610.302, 630.206 (2006); DOD MAN. 1400.25-M, *supra* note 18, SC610, SC630.

²⁸ *See* DOD, REG. 7000.14-R, *supra* note 11, vol. 8, ch. 5, para. 051603 (listing installation closures under excused absence examples). The *Federal Personnel Manual* also had addressed dismissals and excusals in respective chapters but referred to group dismissals as a form of excused absence. Excused absence was synonymous with administrative leave. U.S. OFFICE OF PERSONNEL MGMT., BASIC FEDERAL PERSONNEL MANAGEMENT ch. 630, paras. 11-7a, 11-9a(2) (Last OPM Update: Inst. 344, June 21, 1988) (obsolete); *see also* AR 690-990-2 (obsolete), *supra* note 11, bk. 610, para. S3-3 (treating dismissal as an excused absence).

²⁹ *See, e.g.*, DOD MAN. 1400.25-M, *supra* note 18, SC610.3, SC630.7; Army Personnel Management and Information Support System, *Excused Absences and Administrative Dismissal*, <http://cpol.army.mil/library/permiss/5012.html> (last visited Feb. 27, 2006) [hereinafter PERMISS article].

³⁰ *See* 5 U.S.C. § 301 (2000).

³¹ DOD MAN. 1400.25-M, *supra* note 18, SC610.3.1. For example, dismissal may be appropriate for severe, hazardous weather, unforeseen power or water outages, and similar instances. *Id.*

³² *Id.* SC610.3.2.2.

³³ *Id.* SC610.3.3.1.

³⁴ *Id.* SC610.3.1.

³⁵ *Id.* SC610.3.3.2.

dismissed.³⁶ Given this limitation, administrative dismissal authority is not the authority behind the DOD's use of a fifty-nine-minute rule.

Excused Absence—What the Fifty-Nine-Minute Rule Is

A second category of administrative leave within the DOD is administrative excusal or excused absence.³⁷ The Department of Defense defines an excused absence as “an authorized absence from duty without loss of pay and without charge to other paid leave . . . [that is] part of an employee's basic workday even though the employee does not perform his or her regular duties [T]he authority to grant excused absence must be used sparingly.”³⁸ This absence is distinct from an employee's absence to perform official but non-regular duties away from his or her normal duty location.³⁹ The *DOD Civilian Personnel Manual (CPM)* provides a non-exhaustive list of examples that may qualify for excused absence treatment, including voting and blood donation.⁴⁰ Although a group excusal of employees for fifty-nine-minutes is not among the listed examples,⁴¹ absent other authority, such a provision within the DOD must be a form of excused absence.

The Fifty-Nine-Minute Rule

The fifty-nine-minute rule, or “1-hour power” as it is sometimes called, is not designated as such in any federal, DOD, or Army regulation.⁴² As mentioned at the outset of this article, the fifty-nine-minute rule principally takes two forms: (1) a mechanism to excuse occasional tardiness and brief absences; and (2) a mechanism to authorize the early release of groups of employees on special, infrequent occasions.⁴³ This dichotomy in use contributes to the confusion surrounding the rule's origins and purpose.

The fifty-nine-minute rule purportedly emanates from a provision in the *Code of Federal Regulations (CFR)* that gives agencies the discretion to forgive brief absences when employees otherwise would have to be overcharged leave in minimum increments.⁴⁴ The OPM has provided federal agencies two distinct ways to avoid the inequity of a leave overcharge. First, they could prescribe a minimum leave charge shorter than OPM's one-hour minimum charge.⁴⁵ Second, they could excuse an employee who is “unavoidably or necessarily” absent for less than one hour or tardy for “any adequate reason.”⁴⁶

This OPM rule provides authority to forgive an employee's unplanned failure to report to work on time (the first use of the fifty-nine-minute rule), but that situation obviously differs from a management-initiated, group release of employees who have already reported to work (the second use of the fifty-nine-minute rule). Indeed, either use of the fifty-nine-minute rule may seem so removed from its ostensible origins that one would do well to identify some other authority behind it. After all, the current minimum leave charge for agencies within the DOD can be as low as six minutes.⁴⁷ For the Army, the minimum

³⁶ *Id.* SC610.3.1.

³⁷ See U.S. DEP'T OF DEFENSE, ADMIN. INSTR. 67, LEAVE ADMINISTRATION para. 15 (27 Dec. 1988) [hereinafter DOD ADMIN. INSTR. 67] (using the term, “administrative excusals”). The Administrative Instruction applies to the Office of the Secretary of Defense, the Joint Chiefs of Staff and other activities assigned to Washington Headquarters Service for administrative support. *Id.* para. 2. See also DOD MAN. 1400.25-M, *supra* note 18, SC630.7.

³⁸ DOD MAN. 1400.25-M, *supra* note 18, SC630.7.1; see also DOD REG. 7000.14-R, *supra* note 11, vol. 8, ch. 5, para. 051601. Army definitions are similar. See U.S. DEP'T OF ARMY, PAM. 37-2, TIME AND ATTENDANCE REPORTING FOR THE STANDARD ARMY CIVILIAN PAYROLL SYSTEM para. 4-17 (6 Jan. 1988) [hereinafter DA PAM. 37-2]. These definitions are consistent with Comptroller General definitions. See, e.g., Satwant Singh Bajwa, B-185128, 1975 U.S. Comp. Gen. LEXIS 1478, *1-2 (Dec. 3, 1975).

³⁹ U.S. Dep't of Commerce, Excused Absences, http://ohrm.os.doc.gov/Leave/DEV01_000049.html (last visited Mar. 16, 2006).

⁴⁰ DOD MAN. 1400.25-M, *supra* note 18, SC630.7.4.

⁴¹ *Id.* (listing only common instances).

⁴² See, e.g., DOD ADMIN. INSTR. 67, *supra* note 37, para. 15.2.12.

⁴³ See, e.g., *infra* notes 112, 113, and accompanying text. Weber v. Dep't of Navy, 100 F.M.S.R. 80434 (Jan. 18, 2000).

⁴⁴ 5 C.F.R. § 630.206 (2006). For example, where leave is charged in minimum increments of sixty minutes, an employee who is ten minutes late to work would be overcharged fifty minutes of leave if forced to take leave to cover the tardiness. *But see* 70 Fed. Reg. 1072 (5 Jan. 2005) (indicating a one hour leave charge may soon vanish).

⁴⁵ 5 C.F.R. § 630.206(a).

⁴⁶ *Id.*

⁴⁷ DOD MAN. 1400.25-M, *supra* note 18, SC630.2; see also DOD REG. 7000.14-R, *supra* note 11, vol. 8, ch. 5, para. 050106.

leave charge normally is fifteen minutes.⁴⁸ The fact that a fifty-nine-minute rule survives within the DOD, in spite of reduced minimum leave charges, suggests that it encompasses purposes other than the avoidance of a leave overcharge.⁴⁹ And, it is important to remember that the OPM does not preempt agency and departmental discretion in this area.⁵⁰

It is the broad agency discretion to authorize brief excused absences that probably best explains the current use of the fifty-nine-minute rule. In fact, Comptroller General decisions recognize the use of such discretion in granting excused absences for brief periods, so long as it does not violate a statute or regulation.⁵¹ While agencies are largely free to grant excused absences within those parameters, their internal authority to invoke the rule depends upon authorized instances and proper approval levels.⁵²

Granting Fifty-Nine-Minute Excused Absences to Groups of Employees

Agency regulations often provide for excused absences in specific situations that are typically illustrative not exclusive, and that may vary within an agency or department.⁵³ Thus, a regulation provision that supports early releases under the fifty-nine-minute rule is not critical to the exercise of such releases, but it is also not without precedent. For example, a supplement to the retired *Federal Personnel Manual* (FPM) authorized excused absences for groups of employees for various purposes, as agencies deemed appropriate.⁵⁴ The current *DOD CPM* has no similar provision, but neither does it limit excused absences strictly to individual employees. Further, the *CPM* and other DOD publications affirm the authority to excuse brief absences,⁵⁵ and some DOD components and offices employ an excusal ground of “tardiness and brief absences of periods less than 1 hour” with no further qualifications or limitations.⁵⁶ Thus, the DOD does not foreclose managerial discretion to excuse groups of employees from duty, within this time limit, for most any good reason not covered by other rules.

The Army, of course, is one of the DOD’s subordinate military departments.⁵⁷ While the Army’s regulation for this area is obsolete,⁵⁸ the current (1988) Army pamphlet on point reflects the old FPM guidance that “excused absences are authorized on an individual basis, except where an installation is closed [referring to a dismissal] or a group of employees is

⁴⁸ DA PAM. 37-2, *supra* note 38, para. 2-3c; *see also* PERMISS article, *supra* note 29 (explaining: “the charge is made in ¼ hour multiples unless a different minimum charge is negotiated. . .”).

⁴⁹ An unnamed OPM spokesman was attributed in an article as having explained that this “flexibility is not officially referred to as the ‘59 minute rule,’ but it can be construed from the language of 5 CFR 630.206 under ‘Minimum Charge.’” Kathleen Filipczyk, cyberFEDS@, ‘59 Minute Rule’ Can Be Used for Unexpected Leave (Dec. 15, 2003), available at <http://www.cyberfeds.com/> [hereinafter Filipczyk]. The article continued:

The rule defines the following examples: . . . If an employee is unavoidably absent or tardy for less than one hour, the agency for adequate reason may excuse the employee without charge to leave. Requests for leave within ‘59 minutes’ can encompass reasons for inclement weather and holiday observance or travel. When an employee is granted leave for an unauthorized absence or tardiness, the agency may not require . . . work for any part of the leave period.

Id. Note, though, the article can be misleading in that a provision on “inclement weather and holiday observance or travel” is not found in the text of the CFR rule (or in the summarized LRP Publications version of this article). *See* 5 C.F.R. § 630.206 (2006); LRP Pub., ‘59 Minute Rule’ Can Be Used for Unexpected Leave, FED. HUM. RESOURCES WK. vol. 10, no. 34 (Dec. 22, 2003) (providing a summary of the article).

⁵⁰ *See supra* note 15.

⁵¹ *See, e.g.*, Elmer DeRitter, Jr., B-207996, 1982 U.S. Comp. Gen. LEXIS 40561, *3 (Sept. 28, 1982).

⁵² *See* DOD MAN. 1400.25-M, *supra* note 18, SC630.7.2, SC630.7.4.

⁵³ *See e.g., id.* SC630.7; DOD REG. 5500.7-R, *supra* note 5, paras. 3-300b and c; DOD REG. 7000.14-R, *supra* note 11, vol. 8, ch. 5, para. 0516; DOD ADMIN. INSTR. 67, *supra* note 37, para. 15; AR 690-990-2 (obsolete), *supra* note 11, bk. 610, para. S3-3; DA PAM. 37-2, *supra* note 38, para. 4-17b; U.S. EUROPEAN COMMAND, DIR. 30-12, HOURS OF DUTY para. 10c (15 July 1999); U.S. ARMY IN EUROPE, PAM. 690-630, EXCUSED ABSENCE para. 4 (14 Feb. 2005) [hereinafter USAREUR PAM. 690-630].

⁵⁴ U.S. OFFICE OF PERSONNEL MANAGEMENT, FEDERAL PERSONNEL MAN. SUPPLEMENT 990-2, bk. 630, para. S11-1, *cited in* A Christmas Case, B-215039, 1984 U.S. Comp. Gen. LEXIS 36, *2 (Dec. 24, 1984).

⁵⁵ DOD 7000.14-R, *supra* note 11, vol. 8, ch. 5, para. 051604 (permitting excused absences for “tardiness and brief absences”); DOD MAN. 1400.25-M, *supra* note 18, SC630.7.3.

⁵⁶ DOD ADMIN. INSTR. 67, *supra* note 37, para. 15.2.12.

⁵⁷ 5 U.S.C. §§ 101, 102 (2000).

⁵⁸ AR 690-990-2 (obsolete), *supra* note 11. The Army regulation qualified the *FPM Supplement*’s provision on group release for various reasons by providing that excused absences were “authorized on an individual basis, except where an activity . . . [was] closed or a group of employees on a specific project [was] excused from work (See book 610.S3).” *Id.* para. S11-1. The regulation’s book 610, however, only covered excused absence used for administrative dismissals and while it addressed activity closings it made no mention of, and thus had no applicability to, groups of employees on specific projects. *Id.* paras. S3-1 - S3-3. The term “specific project” was not defined in AR 690-990-2, but perhaps was intended to restrict such group releases.

excused from work for various reasons. . . .”⁵⁹ The pamphlet leaves those reasons to lower echelon discretion, but directs management to “[c]onsult installation regulations for the various types of administrative leave authorized. . . .”⁶⁰ Echoing the CFR provision on excusal of tardiness and brief absences, one on-line source of Army guidance simply provides that agencies “may also excuse employees for *unavoidable* absences of less than one hour [emphasis added]” so long as the employee’s reasons are “acceptable” to management.⁶¹ This guidance might appear to suggest that Army managers are limited in their ability to grant such excusals⁶²—a view of the fifty-nine-minute rule that some non-Army sources also seem to share.⁶³ That guidance, however, is far from exclusive.⁶⁴

This discretion can affect the manner in which the fifty-nine-minute rule is used within a major Army command (MACOM) or other organization. Current guidance within the U.S. Army, Europe, for example, provides excused absence authority for “brief absences (less than one hour)” with no requirement of unavoidability or necessity.⁶⁵ Army regulations do not restrict the latitude that the DOD affords them on this ground,⁶⁶ and that MACOM’s regulation does not restrict the Army’s authorization of group excusals for “various reasons.”⁶⁷ Hence, group excusals for less than one hour are within the MACOM’s discretion. As such, they will be sustained unless they are arbitrary, capricious, an abuse of discretion, or are otherwise unlawful.⁶⁸ If Army installation, MACOM, or subordinate level regulations restrict excused absences, however (e.g., to individual cases only, or to require an unavoidable absence), they arguably prevent group excusals under the fifty-nine-minute rule (even as a locally-authorized holiday good will gesture⁶⁹). Under such restrictions, granting excused absence to an entire office could appear to be an improperly authorized dismissal.

The Merit Systems Protection Board on the Fifty-Nine-Minute Rule

At least one appeal to the U.S. Merit Systems Protection Board (MSPB) has noted the importance of agency regulations in invoking the fifty-nine-minute rule. In January of 2000, the administrative judge (AJ) in *Weber v. Dep’t of Navy*⁷⁰ considered an appellant’s claim that he was not selected for promotion in retaliation for his Whistleblower’s Protection Act disclosures.⁷¹ Among other issues (principally, his non-selection for promotion), the appellant had disclosed that his third-line supervisor allowed a group of employees who had worked the Friday after Thanksgiving to go home fifty-nine minutes early, but had denied this benefit to others allegedly in violation of 5 U.S.C. §§ 2301 and 2302.⁷² The appellant had not even been at work that day but claimed that this selective excusal was an abuse of authority.⁷³

⁵⁹ DA PAM. 37-2, *supra* note 38, para. 4-17.

⁶⁰ *Id.*

⁶¹ PERMISS article, *supra* note 29 (asserting that excused absence normally addresses individual cases).

⁶² For example, focusing on one use of fifty-nine-minute authority can imply there is no other use. *See supra* note 43 and accompanying text.

⁶³ *See, e.g.,* Filipczyk, *supra* note 49 (noting that “[h]oliday travel, unexpected family emergencies, and extreme weather can require employees to request unplanned leave. In cases such as these, supervisors may grant the ‘59 minute rule,’ but elaborating that the rule “can be used for all employees as long as the reasons are justifiable. Cases of occasional tardiness to work, for example, due to a flat tire or problem at home can also be covered by the rule. . . . And it is best if used sparingly to avoid overuse by employees.

⁶⁴ The PERMISS guidance implies that other uses can exist. *See supra* note 61 and accompanying text (employing phrases such as “may also excuse employees for”).

⁶⁵ USAREUR PAM. 690-630, *supra* note 53, para. 4.

⁶⁶ *See generally* DA PAM. 37-2, *supra* note 38.

⁶⁷ *See generally* USAREUR PAM. 690-630, *supra* note 53.

⁶⁸ 5 U.S.C. § 706 (2000); *see, e.g.,* George J Keenan, B-209285, 1983 U.S. Comp. Gen. LEXIS 1471 (Mar. 22, 1983) (applying this standard in an excused absence context).

⁶⁹ GAO PERSONNEL LAW MAN., *supra* note 15, tit. II, ch. 5:0.2, para. B 12 (allowing excused absence for group release as a holiday good will gesture, without any specific agency illustrative provision). *But see* U.S. EUROPEAN COMMAND, DIR. 30-12, HOURS OF DUTY para. 10c (15 July 1999) (rebuking use of excused absence solely to supplement leave, and defining the absence as one “granted to individual employees”); *see also* U.S. DEP’T OF TREASURY, INTERNAL REVENUE MAN. ch. 600, sec. 6060.1.8.8 (1 Jan. 2003) (restricting releases of “all IRS employees, such as . . . on the eve of a holiday” to the Commissioner or his agent, but allowing supervisors authority to grant up to fifty-nine minutes of administrative time off “in recognition of extra effort or a particular personal circumstance” of an employee).

⁷⁰ *Weber v. Dep’t of Navy*, 100 F.M.S.R. 80434 (Jan. 18, 2000).

⁷¹ *Id.* at intro.

⁷² *Id.* at Analysis and Findings, para. 3.

⁷³ *Id.* para. 8.

The record showed that only those employees who had worked assembling workstations on the Friday after Thanksgiving received the excused absence.⁷⁴ The AJ found that, even if proven, the allegations would not be protected under the Act, stating that: “The appellant . . . conceded that the ‘fifty-nine-minute’ rule is lawful. He simply claim[ed] that it [had been] unfairly applied. However, none of the statutory provisions . . . proscribe or limit the manner in which a supervisor applies such a rule.”⁷⁵ In examining 5 U.S.C. § 2301, the AJ observed that the appellant had never claimed that political affiliation or prohibited discrimination were factors in granting the fifty-nine-minute rule.⁷⁶ Finally, regarding 5 U.S.C. § 2302, the AJ concluded, that the record did not evince that the supervisor’s action “violated any other law, rule, regulation, agency policy, internal guidelines or work practices”⁷⁷ thus recognizing that management’s legitimate use of the fifty-nine-minute rule need not be limited to situations of individual or unavoidable absence.⁷⁸

The Comptroller General on Group Releases

A more eloquent administrative decision supporting the use of excused absence in conjunction with a holiday, for an ostensibly longer period, is the festive, 1984 Comptroller General decision, *A Christmas Case*.⁷⁹ “On . . . the last workday before Christmas, the Installation Commander of Fort Sheridan, Illinois, released the Installation’s civilian employees for the afternoon as a “holiday good-will gesture.”⁸⁰ In a move that could have turned Ebenezer Scrooge, Grinch-green with envy:

the Civilian Personnel Officer found the action to be a humbug stating that the Commander had no authority to release employees as a holiday good-will gesture [and that this] . . . ‘contravened relevant provisions of the Federal Personnel Manual Supplement [since] . . . if an employee’s absence does not clearly serve the best interests of the service, as compared to personal interests of the employee . . . [it] must be charged to the appropriate type of leave.’⁸¹

The Comptroller General noted that the *FPM Supplement* (then in effect) controlled the issue, absent intermediate restrictions.⁸² Significantly, the decision emphasized the *FPM Supplement*’s provision that excused absences were “‘authorized on an individual basis, except where an installation [was] closed, or a group of employees [was] excused from work for various purposes.’”⁸³ The Comptroller General explained in conclusion:

The controlling issue here is not the prudence . . . but rather, the validity and effect of that order. We find nothing in the order to indicate that it was arbitrary . . . or . . . otherwise contrary to law or specific regulation. We are aware of some precedent for such a practice in both the public and private sectors. Accordingly, we are upholding the Installation Commander’s exercise of the discretionary authority It follows that the employees in question are entitled to administrative leave—everyone of them.⁸⁴

Current GAO guidance evinces the continuing validity of this interpretation of authority to grant administrative leave.⁸⁵

⁷⁴ *Id.*

⁷⁵ *Id.* para. 6.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*; see also *Tague v. Dep’t of Navy*, AT-0752-02-0422-I-1, 103 LRP 916, Analysis and Findings (Dec. 30 2002) (reflecting an appellant’s guidance to subordinate supervisors that employees “may not leave except on the hour unless authorized under the 59 minute rule”) (on file with author). The MSPB’s initial decision in that case from the Naval Station at Pascagoula, MI, elaborated: “under the ‘59 minute rule,’ a police officer could be permitted up to 59 minutes of paid time off the clock without having to utilize any leave.” *Id.* note 4.

⁷⁹ *A Christmas Case*, B-215039, 1984 U.S. Comp. Gen. LEXIS 36 (Dec. 24, 1984).

⁸⁰ *Id.* at *1.

⁸¹ *Id.* at *1-2.

⁸² *Id.* at *3 (observing that because the Army has not specifically regulated administrative leave, the *FPM Supplement*’s examples had general applicability). “However, this listing [of examples] is not exclusive nor does it purport to usurp the discretion of agency heads or installation commanders to make grants of short periods of administrative leave in appropriate cases.” *Id.*

⁸³ *Id.* at *2.

⁸⁴ *Id.* at *3-4.

⁸⁵ GAO PERSONNEL LAW MAN., *supra* note 15, tit. II, ch. 5:0.2, para. B 12.

The Federal Labor Relations Authority (FLRA) on Early Releases for Special Occasions

Collective bargaining agreements also may specifically address and restrict the use of the fifty-nine-minute rule.⁸⁶ The wide discretion afforded to agencies in determining the lawful purposes for such absences, was pertinently illustrated in the 1996 FLRA decision in *Dep't of Veterans Affairs Medical Center Asheville, North Carolina and AFGE Local 446, AFL-CIO*.⁸⁷ In that case, the medical center unilaterally discontinued a past practice of granting employees four hours of administrative leave each year for their birthdays.⁸⁸ The union filed an unfair labor practice charge,⁸⁹ the agency admitted it had failed to meet its obligation to negotiate the impact and implementation of the discontinuation⁹⁰ and focused on the legality of the practice, with the nature of the remedy being the only issue in dispute.⁹¹

Speaking against a status quo ante remedy, the agency argued that its past practice was illegal and thus could not be given retroactive effect since, among other points, excused absence was not historically granted on a routine basis and was intended for purposes such as voting, registering to vote, and excusing tardiness.⁹² Further, the agency argued, employee birthdays failed to meet the criteria in an agency directive that prescribed the use of excused absences for activities considered to substantially benefit the agency in accomplishing its mission or functions, or that clearly enhanced the employees' abilities to perform in their positions.⁹³ Finally of note, the agency argued that the practice was tantamount to granting holidays, which the agency had no local authority to do.⁹⁴

The Administrative Law Judge (ALJ), nonetheless, found the agency's arguments did not establish that the practice was illegal.⁹⁵ The judge observed that whether an activity would benefit an agency mission or enhance an employee's ability to perform was "not set in concrete," but remained a subjective determination.⁹⁶ The ALJ granted a summary judgment finding a violation of 5 U.S.C. §§ 7116(a)(1) and (5) and ordered a status quo ante remedy, but limited its retroactivity on equitable grounds to the calendar year of the decision.⁹⁷ The agency filed exceptions for FLRA consideration.⁹⁸

Among other issues, the agency again argued that a status quo ante remedy was improper where a past practice had been illegal, emphasizing that the *FPM* and *FPM Supplement* provided discretion to grant administrative leave "only in circumstances where there [was] a Government or civic interest."⁹⁹ Although noting that the relevant *FPM* provisions had

⁸⁶ See, e.g., Labor Agreement—American Federation of Government Employees, Local 1869—Dep't of Air Force, Charleston Air Force Base, South Carolina, sec. 20.2 (n.d.), available at [http://www.cyberfeds.com/CF3/index.jsp?contentId=5006&chunkid=176950&query=\(\(59+MINUTE+RULE\)\)\)&chunknum=1&topic=Main&listnum=0&offset=2](http://www.cyberfeds.com/CF3/index.jsp?contentId=5006&chunkid=176950&query=((59+MINUTE+RULE)))&chunknum=1&topic=Main&listnum=0&offset=2) (last visited June 5, 2005) (limiting the use of the "59 minute rule" to situations of "unavoidable tardiness and/or brief absence" and restricting excusal consideration to "rare and unusual" circumstances) (on file with author). But see Stephen Weeks, President, American Federation of Government Employees, Local 1917, N.Y. District, *JFK Airport Notice to All*, <http://www.local1917.org/id25.htm> (last visited Aug. 12, 2005) (explaining management's error in not letting some customs officers leave work fifty-nine-minutes early (or take a one-hour lunch break, either), the article provided: "They couldn't understand where we got this. I guess they forgot that when they placed Treasury employees on our line . . . [and when those employees were not needed] for overtime, they were allowed to leave 59-minutes early because they had the 59-minute rule (this also takes place in NJ and Miami).") (last visited June 5, 2005) (on file with author).

⁸⁷ Dep't of Veterans Affairs Med. Ctr. Asheville, NC & AFGE Local 446, AFL-CIO, 1996 FLRA LEXIS 79 (July 19, 1996). Agencies or organizations that do not specifically address the rule and then unilaterally seek to restrict their established use of it, risk unfair labor practice charges. See, e.g., U.S. Customs Serv., Customs Mgmt. Ctr., Miami, FL and NTEU, Chapter 137, 56 F.L.R.A. 809 (2000) (affirming the past practice of granting administrative leave for employee participation in athletic competitions); Dep't of Agriculture, Forest Service, Arlington, VA and NFFE Forest Serv. Council, 96 F.S.I.P. 144 (Dec. 18, 1996) (affirming the past practice of granting administrative leave to annually celebrate "Three Kings Day" on 6 January).

⁸⁸ Dep't of Veterans Affairs Med. Ctr. Asheville, NC & AFGE Local 446, AFL-CIO, 1996 FLRA LEXIS 79, at *1-2.

⁸⁹ *Id.* at *1.

⁹⁰ *Id.* at *37-38.

⁹¹ *Id.* at *38.

⁹² *Id.* at *38-39.

⁹³ *Id.* at *39.

⁹⁴ *Id.*

⁹⁵ *Id.* at *39-40.

⁹⁶ *Id.* at *40 (adding that, to the ALJ's knowledge, other departments and agencies regularly granted excused absence for occasions such as Christmas parties, awards ceremonies, welcoming a new official, and the like, none of which were specifically enumerated in the agency directive and yet, no matter how another might disagree, none of which were unlawful). Note that the use of administrative leave referenced here was ostensibly to facilitate attendance at these activities, not necessarily to leave work early after their conclusion.

⁹⁷ *Id.* at *45-46.

⁹⁸ *Id.* at *1.

⁹⁹ *Id.* at *5. The agency also argued that the retroactive crediting of leave would violate management's right to assign work because it eliminates their authority to approve or disapprove leave. *Id.* at *6. Due to the ultimate disposition of remedy, the Authority did not further address this issue. *Id.* at *19. Generally, management's right to assign work is not affected by administrative leave provisions that require supervisory determinations that such leave will

been abolished as of 31 December 1994,¹⁰⁰ the Authority found that the agency “had discretion while the *FPM* was in effect to grant brief periods of excused absence in connection with employee birthdays and [especially significant to our discussion, there existed] no basis argued or apparent on which to conclude that such discretion was eliminated by abolishment of the *FPM*.”¹⁰¹ In dismissing the agency’s *FPM*-related concerns, the Authority noted that the agency had pointed to “no specific portion of the *FPM* that clearly established that the practice was unlawful” and the fact that “employee birthdays” was not listed among *FPM* examples was not dispositive of agency discretion to grant brief absences for birthdays.¹⁰²

Supporting its finding that administrative leave could be used for such purposes, the authority cited *A Christmas Case*,¹⁰³ noting that a dispositive factor in such circumstances was whether the agency had originally approved or disapproved the leave in issue.¹⁰⁴ The Authority acknowledged that it had on occasion previously held that administrative leave “must bear some relationship to the situations described in subchapter 11 [of *FPM* Chapter 630],” and that such leave was “restricted to the circumstances described in the *FPM*.”¹⁰⁵ The Authority then broke from this precedent concluding: “we find . . . no basis in either the *FPM* or Comptroller General decisions interpreting the *FPM* provisions to limit the ability of agencies to determine the appropriate uses of administrative leave. Authority decision to the contrary will no longer be followed.”¹⁰⁶

The authority thus sustained the practice of granting eight hours of administrative leave for an employee’s birthday as lawful.¹⁰⁷ Similar to the Comptroller General’s approach in *A Christmas Case*, the Authority here distanced its finding of legality from any endorsement of management’s actions. The Authority cautioned that its conclusion should not be misconstrued as a finding that the practice of granting administrative leave for employee birthdays was prudent.¹⁰⁸ The Authority ordered, among other items, that the agency cease and desist from unilaterally discontinuing the practice of granting employees administrative leave for their birthdays and, upon union request, that it bargain concerning the discontinuation of the practice and retroactively apply the results.¹⁰⁹

Because a practice of releasing employees from duty fifty-nine-minutes early on various appropriate occasions obviously is not unlawful,¹¹⁰ an agency with a history of relaxed fifty-nine-minute use would face similar difficulties in any unilateral

not interfere with workload demands. National Treasury Employees Union and U.S. Dep’t of Treasury, U.S. Customs Serv., Wash., D.C., 1999 FLRA LEXIS 223, *13-15 (Dec. 24, 1999).

¹⁰⁰ Dep’t of Veterans Affairs Med. Ctr. Asheville, NC and AFGE Local 446, AFL-CIO, 1996 FLRA LEXIS 79, at *5.

¹⁰¹ *Id.* at *9. The general counsel noted that the respondent agency “offered no case law, rule, or regulation that prohibit[ed] it from exercising its discretion to grant a short period of administrative leave in connection with employee’s birthdays.” *Id.* at *7.

¹⁰² *Id.* at *10 (holding “the result we reach in this case would be the same regardless of whether the *FPM* was applied”).

¹⁰³ See, e.g., *supra* note 84 and accompanying text.

¹⁰⁴ Dep’t of Veterans Affairs Med. Ctr. Asheville, NC and AFGE Local 446, AFL-CIO, 1996 FLRA LEXIS 79, at *11.

¹⁰⁵ *Id.* at *14.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at *8-15. *But see id.* at *26 (disagreeing with the validity of the practice, Member Armendariz, in a separate opinion, explained that under the *FPM* an agency may grant administrative leave in circumstances which should “(1) be directly related to the agency’s mission; (2) enhance the professional development or skills of employees in their current position; or (3) be officially sponsored or sanctioned by the agency head.”). Member Armendariz would have concluded the practice of granting four hours of administrative leave for employee birthdays was not authorized by the *FPM*, and would have continued to follow Authority decisions along those lines. *Id.* at *29-30.

¹⁰⁸ *Id.* at *15 (footnoting that four hours per birthday was consistent with the *FPM* requirement that excused absences be granted for brief periods of time, citing AFGE, AFL-CIO, Local 3804 and FDIC, Madison Region, 21 F.L.R.A. 870, 898 (May 19, 1986) wherein a provision that each employee of a bargaining unit would receive eight days of official time to use as personal days, at their discretion was inappropriate given the stated purpose). The cited decision continued:

the Comptroller General has approved agency grants of approximately five (5) hours of administrative leave for an employee to rest after prolonged and difficult travel, 55 Comp. Gen. 510 (1975), and eight (8) hours for an employee to locate suitable housing in connection with an extended temporary assignment, Comptroller General Decision B-192258 (September 25, 1978), both of which were work-related situations. The Authority has also found negotiable a proposal which would have required authorization of a maximum of thirty (30) minutes of administrative leave per pay period for tardiness (that is, a maximum of 13 hours a year). . . . Conversely, the Comptroller General has held that a grant of administrative leave for excess travel time is inappropriate where the excess time taken is attributable to an employee’s delay for personal reasons or as a matter of personal convenience. 56 Comp. Gen. 865, 868-69 (1977). Moreover, the Comptroller General refused to question an agency’s denial of eight (8) hours of administrative leave to an employee who, as the elected chief of a local all volunteer fire department, participated in fighting a fire and was absent from duty for that amount of time. 54 Comp. Gen. 706 (1974).

AFGE, AFL-CIO, Local 3804 and FDIC, Madison Region, 1986 FLRA LEXIS 454, *56-58 (May 19, 1986).

¹⁰⁹ Dep’t of Veterans Affairs Med. Ctr. Asheville, NC and AFGE Local 446, AFL-CIO, 1996 FLRA LEXIS 79, at *20.

¹¹⁰ See, e.g., *Weber v. Dep’t of the Navy*, 100 F.M.S.R. 80434 (Jan. 18, 2000).

revision of its policy regarding that form of excused absence. Nevertheless, excused absences for brief periods on special, infrequent occasions can be critical to morale. In overseas areas, threat risks and operational difficulties can require managers to exercise a heightened awareness of employee well being to ensure effective operations.¹¹¹ In management's discretion, this may entail greater use of the fifty-nine-minute rule for early releases. Across the DOD, such discretion may result in some organizations invoking the rule more liberally,¹¹² while others take a more conservative approach.¹¹³

Who May Grant Time Off under the Rule?

The DOD CPM states that excused absences should be delegated to the lowest practical level where the "budgetary and mission impact of excused absence decisions can be fully realized."¹¹⁴ Accordingly, absent other restrictions, first line supervisors may grant excused absences, to include fifty-nine minute excusals, to their qualifying subordinates. Army supervisors have long enjoyed this authority.¹¹⁵

Who May Receive Time Off under the Rule?

Thus far, this article has discussed conventional civil service employees receiving time off under the fifty-nine-minute rule;¹¹⁶ however, numerous other individuals work in federal government facilities, not all of whom may be eligible for a fifty-nine-minute excusal. Government contractor employees, nonappropriated fund employees, and overseas local national (LN) employees require further examination.

Contractor employees are not U.S. Government employees.¹¹⁷ Their terms and conditions of employment are established in contracts, not under federal employment law.¹¹⁸ Federal supervisors may not grant excused absences to a private firm's employees.¹¹⁹ Many of the same concerns that surround contractor participation in agency office parties or unit-level activities (e.g., organization days) arise in excused absence situations.¹²⁰ This is a case where "no good deed goes

¹¹¹ Force protection and ordinary living concerns are often exacerbated overseas. See, e.g., USAREUR PAM. 690-630, *supra* note 53, para. 4b(15) (permitting, for example, excused absence for a German court summons, similar to 5 U.S.C. § 6322, but based on consideration of host nation relations). An occasional hour off to run errands, for example, can avoid misuse of eight hours of sick leave.

¹¹² For example, the USAREUR Civilian Personnel Directorate observed "guidance . . . does not specifically address . . . early release at the end of the day for special occasions. There is no prohibition against granting these . . . absences. Excused absences less than one hour have been long-standing agency practices . . . based upon the best interests of the organization and their employees." E-mail from Chief, Program Integration Branch, Civilian Personnel Directorate, U.S. Army, Europe and 7th Army, to author (15 Dec. 2000) (on file with author). Similarly, the Defense General Supply Center permitted supervisors to excuse employee absences up to 59 minutes if it was "in the best interest of the Government to do so." M.E. Smith, B-175627, 1972 U.S. Comp. Gen. LEXIS 2149, *7 (July 5 1972). Excused absences are not to be granted where paid leave is appropriate. See, e.g., USAREUR PAM. 690-630, *supra* note 53, para. 4b; AR 690-990-2 (obsolete), *supra* note 11, bk. 630, para. S11-5a.

¹¹³ See U.S. Army Medical Command, Civilian Personnel Division, Ft. Sam Houston, TX, *Proper Time Keeping*, <http://civpers.amedd.army.mil/TIME.HTM> (last visited May 4, 2005) (noting that timekeeping mistakes include "improperly using the so-called '59 minute rule' . . . [which] is not intended . . . for group absences."); see also U.S. Navy, Naval Support Activity, Human Resources Office, <http://www.lamadd.navy.mil/> (click on HRP, Services, FAQ On Leave) (last visited May 4, 2005) (cautioning that the fifty-nine-minute rule is not intended to "create 'an hour off.'"); U.S. Navy, Naval Postgraduate School, *Leave Information, Excused Absence*, <http://www.nps.navy.mil/Code22/leave.htm#Excused%20Absence> (last updated 8 May 2000) (warning that "this type of excused absence may not be combined with breaks, lunch periods, or any other type of leave."). Ft. Hood Labor Counselor, *Top Ten Legal Landmines for Supervisors of Civilian Employees* para. 2 (3 Mar. 2003), <http://pao.hood.army.mil/corpssja/top10-supervisor-landmines.htm> (listing the fifty-nine-minute rule second only to Weingarten rights on the landmine list and noting that the rule is "typically used at the end of the duty day before a holiday.") (on file with author).

¹¹⁴ DOD MAN. 1400.25-M, *supra* note 18, SC630.7.2.

¹¹⁵ AR 690-990-2 (obsolete), *supra* note 11, bk. 630, para. S11-1; DA PAM. 37-2, *supra* note 38, para. 2-5.

¹¹⁶ *Army Regulation 690-990-2* contained Book 610 on administrative dismissal and Book 630 on excused absence. Book 610, however, included broad statements on excused absence eligibility. These statements (e.g., limiting excused absence for daily, hourly and piecework employees to those with appointments exceeding ninety days, excluding experts and consultants from eligibility, and specifying excused absence duration) applied to excused absence as a dismissal. AR 690-990-2 (obsolete), *supra* note 11, bk. 610, para. S3-3. This is clear from the numbered book in which they appear and from controlling OPM provisions. See, e.g., 5 C.F.R. §§ 610.303; 610.304 (2006).

¹¹⁷ 5 U.S.C. § 2105 (2000).

¹¹⁸ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 5 (1981).

¹¹⁹ U.S. Dep't of Defense, Standards of Conduct Office, Office of General Counsel, *Holiday Guidance on Partying with Contractors and Supervisors* (Dec. 7, 1999) (noting that "[t]he Government usually may not reimburse a contractor for its employees' morale and welfare expenses. The contractor has to decide whether to let its employees . . . forego payment . . . [or require them to work]," and advising prior consultation with the contracting officer and ethics counselor).

¹²⁰ Unscheduled contractor employee departures can interfere with contract obligations. Also:

unpunished.”¹²¹ Not only may the contractor dock the pay of improperly released workers, the government may incur liability for consequent contractor delays and may hold agency supervisors accountable for any resulting unauthorized expenditure of appropriated funds.¹²² Furthermore, the need to facilitate contractor support, and to verify that it is being provided, can necessitate that some federal employees also remain at the work site rather than leaving it fifty-nine minutes early.

Nonappropriated fund (NAF) employees are federal employees, but they are excluded from most of the laws administered by the OPM.¹²³ Consequently, in accordance with DOD and subordinate component regulations, NAF employees may enjoy excused absences on a less restrictive basis than appropriated fund employees.¹²⁴ Nevertheless, within the DOD, supervisors must also exercise this authority sparingly.¹²⁵

Local national employees often are not considered federal employees within the meaning of 5 U.S.C. § 2105, but their federal employment is statutorily authorized.¹²⁶ The DOD contemplates two systems of foreign national employment overseas: indirect hire and direct hire systems.¹²⁷ The host nation is the legal employer of LN employees in the former system,¹²⁸ while U.S. Forces are their legal employer in the latter system.¹²⁹ Employment conditions for LN employees normally are founded in treaties, agreements, or contracts with local unions.¹³⁰ Thus, one must consult these documents and corresponding regulations to determine the scope of excused absence authority for LN employees.¹³¹ Other restrictions may exist. For example, a DOD regulation provision on holidays in foreign areas cautions that “employees may not be relieved of duty without charge to leave or loss of pay on a day that is not their ‘official’ holiday, unless the absence is due to circumstances that prevent work”¹³² This is consistent with DOD’s preclusion on the use of administrative dismissal to effect holidays, activity down days, or training days.¹³³ Thus, local regulations may provide for such holiday excusals when circumstances such as activity closings, critical personnel disruption due to observance of holidays, or emergency conditions

We are creating an expectation that the contractor’s employees will be paid for the day as if they had worked We cannot certify we received contractually required services We interject ourselves into the contractor’s relationship with its employees[and] We could be placed in a position of forcing the contractor to give its employees a day off without pay. . . .

U.S. Army Materiel Command, Chief, General Law/Intellectual Property Law Division, *Ethics Advisory 99-02—Organization Days* (1999), available at <http://www.redstone.army.mil/legal/docs/orgdays.rtf>.

¹²¹ Clare Booth Luce, 1903-1987, http://en.wikipedia.org/wiki/Clare_Boothe_Luce.

¹²² 31 U.S.C. §§ 1341, 1350.

¹²³ 5 U.S.C. § 2105(c).

¹²⁴ DOD MAN. 1400.25-M, *supra* note 18, SC1406.2.1.6; U.S. DEP’T OF ARMY, REG. 215–3, NONAPPROPRIATED FUNDS PERSONNEL POLICY paras. 5-45, 5-46 (29 Aug. 2003) (providing that managers must determine appropriate excused absence situations and administer them impartially); *see also* U.S. Office of Personnel Management, Federal Wage System Nonappropriated Fund Man. S5-15, <http://www.opm.gov/oca/wage/nafnew/in-dex.asp> (last visited Mar. 9, 2006) (listing examples of instances appropriate for administrative leave).

¹²⁵ DOD MAN. 1400.25-M, *supra* note 18, SC1406.2.1.6.

¹²⁶ *See, e.g.*, 22 U.S.C. § 3968(b); 10 U.S.C. § 1584.

¹²⁷ DOD MAN. 1400.25-M, *supra* note 18, SC1231.4.2.

¹²⁸ *Id.* SC1231.4.2, SC1231.4.2.2.

¹²⁹ *Id.* SC1231.4.2, SC1231.4.2.1.

¹³⁰ *Id.* SC1231.3.1, SC1231.3.2.

¹³¹ *See, e.g.*, U.S. ARMY EUROPE, PAM. 690-60, TARIFF AGREEMENTS THAT APPLY TO PERSONS EMPLOYED BY THE U.S. FORCES IN GERMANY (ENGLISH TRANSLATION) art. 26, para. 2(a) (8 Mar. 2004) (translating The Collective Tariff Agreement for the Employees of the Sending States Forces in the Federal Republic of Germany, of 16 December 1966 from German to English). The Tariff Agreement provides for LN pay where “reasons for non-productive time are beyond the employee’s influence.” *Id.* art. 28. Specific excusal grounds are also furnished.

¹³² DOD MAN. 1400.25-M, *supra* note 18, SC1261.3.1.3; *see also* AR 690-990-2 (obsolete), *supra* note 11, bk. 610, para. S3-3f(2)(b) (providing, prior to the regulation’s expiration, that non-U.S. citizens employed outside the United States are “not entitled to the holiday benefits and excused leave provided for citizen employees”). *But see* Dep’t of Agriculture, Forest Serv., Arlington, VA and NFFE Forest Serv. Council, 96 F.S.I.P. 144 (Dec. 18, 1996) (ordering the agency to continue grants of administrative leave to its employees to celebrate on 6 January each year, since “Three Kings Day” was one of the most important annual events in Puerto Rico and the agency had demonstrated no need to change its past practice).

¹³³ *See supra* note 33 and accompanying text.

may prevent the performance of work.¹³⁴ Local regulations also often provide examples of other appropriate instances of administrative leave for LN employees.¹³⁵

Miscellaneous Concerns

The fact that excused absence normally is “considered part of an employee’s basic workday”¹³⁶ precludes the combination of the fifty-nine-minute rule with breaks, lunch periods, and certain leave situations.

In general, two types of breaks can exist in a statutory workday: paid and unpaid breaks.¹³⁷ If an unpaid break is extended beyond its established duration, the total paid hours worked in the day must be extended to complete a forty-hour statutory workweek.¹³⁸ The broad authority in 5 U.S.C. §§ 301, 6101, and 6102, however, allows agencies to grant brief, paid rest periods when beneficial or essential to the efficiency of federal service.¹³⁹ These brief rest periods (e.g., fifteen minutes per morning and afternoon), if granted, are considered part of the employee’s basic workday.¹⁴⁰ Hence, there is no accrual of unused breaks. Because an employee is in a pay status during a rest period he generally may not depart the worksite.¹⁴¹ Therefore, it would be improper to authorize a fifteen-minute break immediately before scheduled leave.¹⁴² This could create duty-hour validation problems.¹⁴³ Similarly, it is inappropriate to combine a break with a fifty-nine-minute excused absence.¹⁴⁴

The distinction between lunch breaks and rest periods is clear. Time spent eating is generally not remunerable and is not considered part of the basic workday unless the employee is required to perform substantial official duties during that period.¹⁴⁵ Unpaid lunch breaks are generally limited by statute to no more than one hour per day.¹⁴⁶ Paid breaks may not be combined with unpaid lunch to increase lunchtime available, because these two types of breaks are authorized under different laws and are not compatible.¹⁴⁷ Thus, it is improper to approve a fifteen-minute break immediately before an unpaid lunch break.¹⁴⁸ Extending the unpaid lunch with a paid, excused fifty-nine-minute absence similarly would be improper.¹⁴⁹

¹³⁴ DOD MAN. 1400.25-M, *supra* note 18, SC1261.3.3; *see also* AR 690-990-2 (obsolete), *supra* note 11, bk. 610, para. S3-3f(2)(b). This Army regulation provision pertains to dismissal situations and not specifically to other authorized excused absences.

¹³⁵ U.S. ARMY EUROPE, REG. 690-69, LOCAL NATIONAL EMPLOYMENT POLICY IN THE FEDERAL REPUBLIC OF GERMANY, TARIFF IMPLEMENTATION AND OVERTARIFF CONDITIONS para. 11b (1 Sept. 1994) (providing “time off will be approved on the basis of equal treatment of all employees . . . at a given location”).

¹³⁶ DOD MAN. 1400.25-M, *supra* note 18, SC630.7.1. *But see, e.g.*, 5 C.F.R. § 551.401(b) (2006) (explaining that under the Fair Labor Standards Act, for employees defined in 5 U.S.C. § 5541(2), paid absences are not considered hours of work for determining overtime). *See* U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ PROCEDURES, USAP 3-4.630.001(M), EXCUSED ABSENCE (ADMINISTRATIVE LEAVE) (Sept. 1, 2001) (providing, excused absence is not official duty and is not covered by Office of Workers’ Compensation Programs or the Federal Tort Claims Act, however, excused absence for disciplinary/adverse actions reasons or pending investigations is covered); *see also* U.S. Dep’t of Commerce, *Excused Absences*, http://ohrm.doc.gov/handbooks/leave/excused_absences.htm (last visited May 4, 2005) (specifying that “[a]n employee, while on excused absence, is not acting within the employer-employee relationship. . .”).

¹³⁷ 5 U.S.C. § 6101 (2000); 5 C.F.R. § 610.121 (2006); *see also* Decision of the Comptroller General, B-190011, 1977 U.S. Comp. Gen. LEXIS 1664, *9-10 (Dec. 30, 1977).

¹³⁸ Decision of the Comptroller General, B-190011, 1977 U.S. Comp. Gen. LEXIS 1664, *9-10.

¹³⁹ Decision of the Comptroller General, B-166304, 1969 U.S. Comp. Gen. LEXIS 2819, *2 (Apr. 7, 1969).

¹⁴⁰ *Id.*

¹⁴¹ Decision of the Comptroller General, B-190011, 1977 U.S. Comp. Gen. LEXIS 1664, *8.

¹⁴² *Id.* at *10-11.

¹⁴³ *Id.*

¹⁴⁴ *See* Filipczyk, *supra* note 49.

¹⁴⁵ *Ayres v. United States*, 186 Ct. Cl. 350, 355, 359-60 (1968); *Bantom v. United States*, 165 Ct. Cl. 312 (1964); Chairman, U.S. Civil Serv. Comm’n, B-149986, 42 Comp. Gen. 195 (1962). Duties over lunch can require payment of overtime. *See* Decision of the Comptroller General, B-166304, 1969 U.S. Comp. Gen. LEXIS 2819, *2-3.

¹⁴⁶ 5 U.S.C. § 6101 (a)(3)(F) (2000); 5 C.F.R. § 610.121(a) (2006); *see also* Decision of the Comptroller General, B-190011, 1977 U.S. Comp. Gen. LEXIS 1664.

¹⁴⁷ AFGE Local 3231 and DHHS, 17 F.L.R.A. 554, 556 (1985), *rev’d. and remanded* 791 F.2d 979, (D.C. Cir., 1986), *reconsidered in* AFGE Local 3231 and DHHS, 25 F.L.R.A. 600 (1987); *see also* St. Lawrence Seaway Dev. Corp., B-217578, 1986 U.S. Comp. Gen. LEXIS 1462 (Feb. 27, 1986); Decision of the Comptroller General, B-190011, 1977 U.S. Comp. Gen. LEXIS 1664.

¹⁴⁸ Decision of the Comptroller General, B-190011, 1977 U.S. Comp. Gen. LEXIS 1664, *10.

¹⁴⁹ *See* Filipczyk, *supra* note 49.

Agency authority to establish lunch breaks and rest periods is subject to review where the expenditure of public funds is involved.¹⁵⁰

As discussed above, the Comptroller General has determined that paid duty time on rest breaks cannot be tacked onto periods of other scheduled leave at the end of a workday.¹⁵¹ An early departure obtained by adding break time to scheduled leave at the end of a day does not satisfy the time and attendance reporting requirements for an employee to be credited with having worked a full administrative work week.¹⁵² This decision does not prevent a combination of excused absence at the end of one day with holiday leave on the next, though agency rules may limit such use for ethical reasons.¹⁵³ Bear in mind, though, that any excused absence must still be accounted for properly on time and attendance reports.¹⁵⁴

So, Would a DOD Supervisor Really Go to Jail for Granting the Shop Sixty Minutes Off?

Reference to a “fifty-nine-minute rule” regarding early dismissals is a bit misleading. It is at least partially a practice more than a rule to begin with, and its purpose varies among organizations.¹⁵⁵ Even its time designation is a misnomer.¹⁵⁶ Agency minimum leave charges (e.g., of six or fifteen minutes) would force a rounding-off of the employee’s time card to sixty minutes, when the rule is exercised. Moreover, there is no set time limitation for such excused absences when they are not, for example, used to excuse tardiness in reporting to work. The time limitation is more a matter of prudence. The Comptroller General’s *Christmas Case* makes no mention of time for that particular group release other than for the afternoon, but rather, it validates the existence of local discretion to grant brief excused absences that reflect public and private sector practices.¹⁵⁷ The practice at issue there (granting time-off at Christmas) was amply supported. The President, for example, authorized most of the federal executive branch workforce an entire day of excused absence on the day after Christmas in 2003,¹⁵⁸ and similar half-day excusals on Christmas Eve, tied into authority for holiday leave, have been a sporadic tradition.¹⁵⁹ Similarly, the FLRA decision in *Department of Veterans Affairs Medical Center Asheville* exceeded fifty-nine minutes, though the impact (absent multiple, concurrent birthdays) was limited to individuals rather than groups. But, occasional good will gesture releases may be granted, as well, under fifty-nine-minute authority.¹⁶⁰

Thus, while excused absence authority need not be exercised in connection with a flat tire on the way to work, or as a method of avoiding minimum leave charges, an expansive interpretation and application of the rule’s origins (from forgiving tardiness and brief absences for any acceptable reason to granting brief absences for any acceptable reason) coupled with an element of frugality (in terms of brevity of absence and regulatory foundation) likely have led to the retention of its namesake time limitation even when used for early releases of groups of employees. Nothing in DOD or Army regulations precludes a longer “brief period” of group excused absence for valid reasons.¹⁶¹ While managers are not limited to the examples listed in

¹⁵⁰ St. Lawrence Seaway Dev. Corp., B-217578, 1986 U.S. Comp. Gen. LEXIS 1462, *4 (citing B-190011, 1977 U.S. Comp. Gen. LEXIS 1664).

¹⁵¹ Decision of the Comptroller General, B-190011, 1977 U.S. Comp. Gen. LEXIS 1664, *10-11.

¹⁵² *Id.* at *11 (cautioning, “the employee’s time and attendance record, could not accurately reflect 40 hours. . .”). Alternate Work Schedules (AWS) also present additional duty hour considerations for granting such excusals. *See, e.g.*, U.S. GENERAL SERVICES ADMINISTRATION REG. 6010.4, TIME AND LEAVE ADMINISTRATION (02), ch. 12, para. 7c(13) (1996) (providing: “AWS programs must not provide . . . excused absence based on individual daily work patterns. . .”).

¹⁵³ *See e.g.*, E-mail from U.S. Navy, Civilian Human Resources Service Center, Europe, to multiple U.S. Navy human resource officers and directors (Dec. 4, 2003) (providing that “excused absence in excess of 59 minutes may not be used to create or extend a holiday . . . [and cautioning that] granting an excused absence of 4 hours just before or after a holiday creates the impression of creating or extending a holiday and is not consistent with Navy policy,” citing Guidance and Advice Memorandum #72) (on file with author).

¹⁵⁴ *See* DA PAM. 37-2, *supra* note 38, paras. 2-3d, 4-5, 4-17 (requiring the proper entry of administrative leave on attendance records).

¹⁵⁵ *See e.g.*, *supra* notes 112, 113.

¹⁵⁶ Because these excused absences are for “less than one hour” it is technically a fifty-nine-minute, fifty-nine-second authority. Evincing amusement with this aspect of the rule, one blog spot reported: “Since I’m an intern with a[sic] the Department of Defense, I am entitled to . . . the ‘commander’s discretionary 59 minute early secure’. . . since Monday is a holiday, I’m allowed to leave 59-minutes early on Friday. Can I tell you a secret? I left 60 minutes early Friday.” “Sunshine,” DC and Me, 59-Minute Rule, <http://dcandme.blogspot.com/2005/07/59-minute-rule.html> (July 1, 2005).

¹⁵⁷ A Christmas Case, B-215039, 1984 U.S. Comp. Gen. LEXIS 36, *1, *3-4 (Dec. 24, 1984).

¹⁵⁸ Memorandum, Director, Office of Personnel Management, to Heads of Executive Departments and Agencies, subject: Excused Absence for Federal Employees on December 26, 2003 (10 Dec. 2003).

¹⁵⁹ *See, e.g.*, Exec. Order No. 13,281, 67 Fed. Reg. 78,319 (Dec. 19, 2002).

¹⁶⁰ *See, e.g.*, Weber v. Dep’t of Navy, 100 F.M.S.R. 80434 Analysis and Findings, para. 6 (Jan. 18, 2000); *see also* Tague v. Dep’t of Navy, AT-0752-02-0422-I-1, 103 LRP 916 fn. 4 (Dec. 30, 2002).

¹⁶¹ Indeed, such extended absences are not unknown. For example, a contractor employee of the U.S. Naval War College in Newport, RI, wrote, bemoaning his contractor employer’s denial of this privilege:

those regulations, excusal grounds similar to those listed can avoid controversy.¹⁶² In this regard, it appears that no specific excusal ground allows DOD managers more flexibility than “brief absences of periods less than 1 hour.”

Conclusion

The true gray area, therefore, is not what authority there is for a fifty-nine-minute rule, or who has the authority to grant or receive it. The true gray area lies in the purpose and frequency of the rule’s invocation. While regularly recurring excusals that have the effect of a federal workweek reduction in duty hours are outside the parameters of management discretion,¹⁶³ the occasional and infrequent use of the fifty-nine-minute rule as a good will gesture, especially in association with a recognized federal holiday is clearly within them.¹⁶⁴ So, while federal employees need not feel too guilty about getting an occasional hour off, between these examples lays an icy slope that could lead to time and attendance audits and raise issues of proper judgment with the potential for discipline. After all, DOD employees are responsible for the sound stewardship of government resources—every one of them.¹⁶⁵

[W]hen the government want[s] to send its people home early, there are three ways it can do it. The first is by enacting the “59-minute rule,” which closes up shop 59 minutes early with no charge to leave. Why it’s 59 minutes, I’m not sure. The second is liberal leave That’s not that good of a deal. The third, and best in my opinion, is administrative leave, where the government sends its people home [at] such-and-such a time without any charges to leave, basically the 59-minute rule applied on a longer scale.

Unknown, *Lowest of the Low* (July 20, 2004), at <http://www.mhonip.com/index.asp> (on file with author).

¹⁶² Federal Employees Providing Advice and Support to Fed. Credit Unions, B-212457, 1984 U.S. Comp. Gen. LEXIS 653 (Aug. 23, 1984) (providing “the types of activities for which excused absences may be granted are matters of administrative discretion and may be specified or listed in agency regulations”). See also *supra* note 11 and accompanying discussion.

¹⁶³ See *supra* note 9 and accompanying discussion.

¹⁶⁴ See generally *Weber*, 100 F.M.S.R. 80434. See also *Tague*, AT-0752-02-0422-I-1, 103 LRP 916 n.4.

¹⁶⁵ See DOD REG. 5500.7-R, *supra* note 5, para. 2-301b (providing “Government resources, including personnel . . . shall be used by DOD employees for official purposes only.”).