Minahan and Shapiro, P.C.
Attorneys at Law
Daniel Minahan
Barrie M. Shapiro

MINAHAN AND SHAPIRO, P.C.
Attorneys at Law

Phone: 303.986.0054
FAX: 303.986.1137
165 S. Union Blvd. Suite 366
Lakewood, CO 80228

LAW FIRM NEWS

April 2006

Our Regular Reminder

This is a reminder to all our union clients of the various services available from our firm. Most of our retainer agreements provide for unlimited legal advice, on-site visits and filing and processing of unfair labor practice charges. Please contact us if you would like to have one of us do training, meet with employees, or review a case for arbitration, MSPB or EEOC. We are also just a phone call or an e-mail away if you need help or feedback on legal issue connected with federal sector employment. In addition, we provide representation to Union members in MSPB appeals, EEO complaints and labor arbitration for reduced or flat fees if there is a chance we can obtain attorney's fees from the agency if we win. You can learn more about our law firm, and check out our very own proposal for real civil service reform legislation ("The Modern System, MS.1.") online at http://minahan.wld.com.

Telework

The federal government claims to be encouraging its employees to take advantage of opportunities for "flexiplace" or "telework", meaning performing all or most of one's job duties at home. GSA just issued government-wide guidelines for flexiplace arrangements for federal employees: 71 Fed. Reg. 13845 (March 17, 2006) (the Federal Register may be accessed at www.gpo.gov).

Labor arbitrators continue to be called upon to enforce telework arrangements for federal employees represented by unions. Where an agency and a union have negotiated a specific telework agreement, an arbitrator will enforce it. E.g., Department of Health and Human Services, 106 LA 745 (Malin, 1996). However, a recent decision by an arbitrator refused to allow an employee to telework while recovering from major surgery. The arbitrator refused to grant the grievance solely on the basis of the "general policy" favoring telework for federal employees, since there was no express agreement between the union and the agency on telework at that particular facility. U.S. Department of Agriculture, 121 LA 1537 (Fitzsimmons, 2005).

EEO

- The Third Circuit issued an excellent decision on what a person with a disability does or does not have to request in order to be entitled to reasonable accommodations. In Armstrong v. Burdette – Tomlin Memorial Hospital, 17 AD Cases 867 (3d Cir. 2006), the court overturned a jury verdict against the employee where the jury was instructed that a disabled employee must identify and request a specific accommodation that would enable him to continue to perform his

job. The court disagreed, saying the jury should have been instructed that a disabled employee is required only to request an accommodation, and if the jury believes that some sort of accommodation would have enabled the employee to keep his job, the jury may rule in the employee's favor.

- In Rudd v. Shelby County, 44 GERR 161 (6th Cir. 2006) the court decided that a lower court improperly ruled in favor of an employee on a sexual harassment claim. The court stressed that the standard for holding an employer liable for sexual harassment by a co-worker is very different from the standard for holding an employer liable for the behavior of a supervisor. It is much more difficult for an employer to distance itself from sexual harassment by one of its supervisors or managers, compared to co-worker sexual harassment. The court explained that an employer is liable for co-worker sexual harassment only if the employer demonstrates indifference or unreasonableness in light of the facts known to the employer, and that if an employee is sexually harassed by a co-worker, the employer will not be liable for the harassment unless it is clear that the employer knew or should have known that the co-worker had a history of difficulties with women in the workplace.

- The Sixth Circuit gave a real lift to "regarded as disabled" claims of disability discrimination in Todd v. Cincinnati, 44 GERR 207 (7th Circuit, February 3, 2006). The court found that a police department regarded a job applicant as a person with a disability. The court found that the employee was subjected to unlawful discrimination because a number of the supervisors who interviewed him for the job of a firearms instructor at the police academy were under the impression that he was totally disabled from work, simply because he obtained a disability pension almost 10 years earlier.

- The Tenth Circuit recently issued a ruling about the calculation of pre-judgment interest on back pay. The court said it is a mistake to calculate the gross back pay owed and then apply the proper interest rate to that figure. Instead, the court ruled that interest should be computed on each bi-weekly pay period, from the date the employee would have been paid until the date of the judgment in his favor, and only then totaling up all the interest. The decision involved a federal employee. Reed v. Mineta, 44 GERR 316 (10th Cir. 2006).

Union Time: Workers Compensation

The DOL Employee Compensation Appeals Board (ECAB) recently issued a favorable decision for a federal employee who was injured at work while on official time performing union duties. The ECAB granted an award of workers compensation to the union representative since being excused on official time is not considered the same as being absent on leave. Simpson v. Dept of Veterans Affairs, ECAB No. 04-1809P (January 26, 2006).

Lying Makes it Worse

A recent arbitration decision shows how employees can get themselves in more trouble than they were in to begin with if they provide false or deceptive information to the employer during an investigation. In Modine Manufacturing Company, 121 LA 1457 (Duda,

2006), an employee allegedly told a co-worker that he would beat up the supervisor. During the employer's investigation into his remark, the employee not only denied making the threat, but asserted that his co-worker resented him for his reluctance to become romantically involved with her. Arbitrator Duda upheld the company's decision to fire the employee, not just for the threat to harm the supervisor but also because "his conduct in denying having made the threat and the besmirching the reputation of an innocent co-worker doing her duty mitigate against any favorable treatment of him." Strictly speaking, this would be an error on the arbitrator's part if it arose in a federal sector case, since disciplinary actions must stand or fall solely on the charges in the advance written notice given to the employee and cannot be upheld on the employee's behavior after the discipline was imposed or on his behavior at the arbitration hearing. Even so, an arbitrator will find some way to rule against a federal employee if he or she believes the employee is completely untrustworthy.

FLRA Cases

- In Department of Justice, 61 FLRA 460 (2006), the Authority ruled that an agency committed an unfair labor practice by insisting on bargaining by e-mail instead of agreeing to face to face negotiations with the union.

- The D.C. Circuit overturned a ruling by the Authority that two union proposals intended as "appropriate arrangements" for law enforcement officers were non-negotiable. In NTEU v. FLRA, 179 LRRM 2005 (D.C. Cir. 2006), the agency decided to require Customs officers to carry their weapons at all times even while off duty. The union proposed that the officers be allowed reasonable diversions after work, such as trips to the grocery store or gas station, before securing their weapons at home. The union also proposed that the agency expedite investigations of officers accused of violating the new policy. The D.C. Circuit, noting the FLRA is required to balance a number of factors in deciding whether a proposed arrangement that infringes on management's rights excessively interferes with those rights, observed that the FLRA had performed essentially no analysis at all. The court admonished the FLRA that vague statements about public safety and the agency's need to determine its own internal security practices were insufficient to excuse the agency from the obligation to bargain over the union's proposals.

- The Authority sided with management's rights again in Board of Veterans Appeals, 61 FLRA 422 (2005), by overturning an arbitrator's award that barred an agency from measuring employee productivity with a numerical standard. The FLRA ruled that an agency has the right to design and implement performance standards of its choice.

- The "Bonehead Decision of the Month" is Federal Bureau of Prisons, 61 FLRA 515 (2006). The union filed an unfair labor practice charge alleging that the union's chief steward had been transferred to another part of the institution because of grievances he field over two performance log entries. The FLRA found no ULP despite the fact that the warden told the union president that the chief steward's transfer was "what Todd gets for filing all of those petty allegations." According to the Authority, this remark more likely referenced the substance of the chief steward's allegations rather than his protected union activity. So the filing of the grievances was protected

but what was written down on the grievance forms was not protected? Now and then, we see an employer make this same argument in an EEO reprisal case: “we know the employee has a right to file a charge of discrimination but we disciplined him because what he said in the charge was deliberately false.” This nonsense rarely works in court; perhaps some day it will rarely work at FLRA.