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LAW FIRM NEWS

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Happy (Second) Retirement To Paul Hirokawa!

We know all our clients and friends join us in wishing a long and enjoyable second retirement to Mr. Paul Hirokawa. Paul was one of our co-workers back in our FLRA days, but he stuck it out until he retired from FLRA in 1996. Paul was an institution at FLRA and the best LRS they ever had. He became an institution here at our law firm, advocating so effectively on behalf of our union clients that some FLRA folks probably thought of getting themselves institutionalized! Paul has graciously agreed to stay in touch with us as an expert consultant (it was a "no-bid" contracting-out decision by our firm). Ms. Tiffany Malin, having now graduated from law school, will do her best to follow in Paul's giant footsteps. Best wishes, Paul!

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.

We Are Not Barbarians!
(by 5-3 vote, with one abstention)

This has nothing to do with federal sector employment law (at least not yet) but the Supreme Court's June 29, 2006, decision in Hamdan v. Rumsfeld has a lot to do with whether "all men are endowed by their Creator with certain inalienable rights." The case involved a person now detained at Guantanamo, presumably a terrorist but also presumably a human being. Five of the Supremes decided that the Geneva Convention is, in fact, enforceable in court and that since the United States is a signatory to the Geneva Convention, someone in United States custody is entitled to the Convention's

minimum guarantee that one detained in an armed conflict must be given the right to be present at his own trial and to be informed of the evidence against him before being sentenced to death or a term of imprisonment. Three justices dissented (Scalia, Thomas and Alito). The new chief justice, Roberts, abstained because he was a judge on the D.C. Circuit when the case was at that level, and he had already voted in favor of the administration's argument that the Geneva Convention cannot be enforced by the judicial branch of our Government. The President is right: we are in a war. But it is a war of ideals as well as bombs.

Is non-selection for a position non-selection for a position? It depends.

On July 11, 2006, the Federal Circuit issued an encouraging decision in Ruggieri v. MSPB. The Court ruled that an employee is entitled to an opportunity to prove that he was not selected for a position because he blew the whistle on fraud, waste or abuse when the position was announced as vacant and applications were accepted, but then the agency decided not to select anyone and left the position vacant. Don't applaud yet. Three years ago this same Court decided, in Abell v. Dept of Navy, 343 F.3d 1378 (Fed. Cir. 2003), that a person who's veterans preference put him at the top of a list of eligibles for a job had no right to file an appeal alleging non-selection when the agency decided not to fill the position at all, so it wouldn't have to select him or try to get approval from OPM to "pass over" him. The decision in Ruggieri does not refer to Abell. We think one of those decisions is wrong. Guess which one?

Guilty, but Not Guilty as Charged

Sometimes the Federal Circuit rules in favor of employees. Sometimes we wonder why. In Gose v. U.S. Postal Service, decided on June 14, 2006, the Court ruled in favor of a postal employee who was accused of drunk and disorderly conduct at a bar while off-duty but in his postal uniform. The Court decided it didn't matter how drunk or disorderly he got or how negatively it may have reflected on the Postal Service, because the charge against him was "drinking in uniform while in a public place" and he was in the bar at the VFW post, which is not a "public place." Hmmm.

Overtime for pre-shift and post-shift duties

On May 18, 2006, the 11th Circuit ruled in favor of a group of employees in a claim brought under the Fair Labor Standards Act (FLSA). The employees- county building inspectors- are required to pick up a county car at a remote parking lot before work and to return the county car to the same lot after work. The Court ruled that these employees are "on the clock" from the time they pick up the county car until the time they return it and that the county may not regard their "hours of work" as beginning at the first inspection site and ending at the last inspection site of the day.

National Guard Civilian Technician can file Equal Pay Act Claim

Civilian technicians in the National Guard have "dual-status," in that they are considered to be military members for some purposes and civilian employees for other purposes. Many EEO complaints filed by these employees have been dismissed by the courts if they were said to involve "military aspects" of the job. In Jentoft v. United States, however, the Federal Circuit ruled on May 8, 2006, that a National Guard technician could proceed with an Equal Pay Act claim. She alleged she was denied a retention bonus because of her sex. The Federal Circuit broke away from the decisions of the other courts and decided not to examine whether she was challenging some "uniquely military" decision. Instead, the Federal Circuit broadly read 10

USC 10216(a) to say that civilian technicians are considered civilian employees for the purposes of any federal statute.

See No Evil; Hear no Evil

The 8th Circuit recently added to the long-running farce about who is a legitimate "comparison employee" when an employee is claiming discrimination in connection with a disciplinary action. For years, many courts, the MSPB and even the EEOC have said that a plaintiff claiming she was disciplined because of, for example, sex discrimination, cannot compare herself to a male employee who engaged in the same misconduct but got less discipline, unless they both work for the same supervisor in the same building, have the same job, etc. In Yeager v. City Water and Light Plant of Jonesboro, 98 FEP Cases 545 (8th Cir. 2006), Jerry walked over to Carolyn's car when she pulled into the parking lot one day, reached in and grabbed her where he should not. Carolyn complained and Jerry was fired. Jerry filed a lawsuit alleging sex discrimination and presented evidence that Carolyn openly and frequently engaged in sexually-oriented behavior that was also prohibited by the company's sexual harassment policy. The Court ruled that, even if this evidence was completely true, Jerry could not compare himself to Carolyn because Jerry's behavior prompted a complaint (from Carolyn!) and nobody ever complained about what Carolyn did. Now let's see. . . Tom, Dick and Harry are leaving the office. The security guard stops them at the exit and says 3 government laptop computers have been reported stolen and asks them to open their briefcases. Each briefcase has a stolen laptop computer. Harry says "I cannot tell a lie. I'm guilty. I stole it." Tom and Dick say "What laptop computer? I don't see a laptop computer in my briefcase." Tom and Dick are white; Harry is black. Harry is fired. No action is taken against Tom and Dick. Harry doesn't have a remote chance of proving race discrimination, does he?

MSPB Cases

- Most MSPB decisions are so opaque that it's hard to know if the MSPB might have actually made the right decision now and then. Wiley v. U.S. Postal Service (July 11, 2006), involved an initial decision by an MSPB administrative judge to reverse an agency's decision to remove an employee, so you already know the outcome of the agency's appeal to MSPB HQ. In the course of upholding the employee's removal, the MSPB said the judge was wrong to require the agency to prove the various elements of a "threat" under the "Metz" factors listed in a well-known court decision some years ago. The agency did not charge the employee with making a threat, so it did not have to prove such a charge. The agency charged the employee with violating the agency's "zero tolerance" policy against any statements by an employee that are "an actual, implied or veiled threat, made seriously or in jest." OK, fine. The agency didn't have to prove an actual threat. The MSPB judge reinstated the employee because "the evidence did not show that the individuals who heard the statements felt threatened or that the appellant intended to harm anyone." MSPB HQ did not disagree with these findings. However, MSPB said "we find the statements made by the appellant to be very serious," even though the employees who heard them didn't take them seriously. Just another day at the office for the MSPB.

- The MSPB's decision in Williams v. Dept of Army (June 9, 2006), involved an initial decision by an MSPB administrative judge to mitigate an agency's decision to remove an employee to a 20-day suspension, so you know, again, the outcome of the

agency appeal. The agency proved 2 of the 3 charges it made against the employee: “surfing” the internet on August 16, 2004, when he had a stack of mail waiting to be processed, and failure to report back to work promptly on August 18, 2004, after a 9 a.m. appointment with an EEO counselor (he reported back to work at 11:43 a.m.). The MSPB noted the employee’s 32 years of service but found that his misconduct “is indeed serious” and because he had 2 prior suspensions for other misconduct, there was nothing wrong with the agency “pulling the plug” and firing him.