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

November 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.

Union Bargaining Rights

One of the better "one size fits all" cases for explaining a federal union's right to bargain to federal managers is VA Canteen Service, 44 FLRA 162 (1992). The agency in that case responded to a union's request to negotiate over food prices in the cafeteria with something many of you have heard: "this is within the discretion of the agency and not subject to negotiations." The Authority ruled that whenever an agency has discretion to make decisions affecting personnel policy or conditions of employment, it must negotiate with the union over how that discretion is exercised, unless there is a clear statement in the law that the agency's discretion cannot be restricted in any way.

Hard to believe, but a recent decision by FLRA reinforces the unions' right to negotiate in advance over changes affecting employees' working conditions. In Perterson Air Force Base, Colorado, 61 FLRA 688 (2006), management implemented a reduction-in-force in the face of the union's request to negotiate concerning it. The Authority rejected management's argument that the Union lost its opportunity when it did not include specific proposals with its initial request to negotiate. As part of the remedy, the Authority ordered management to rescind the RIF and put the affected employees back to work with back pay.

This One is Just Plain Mean

Sometimes you wonder what the world did to the current members of the MSPB to make them so, well, nasty. By a 2-1 vote, the

MSPB decided on September 27, 2006, in Shanoff v. Office of Personnel Management, 2006 MSPB 298 (2006), to uphold OPM's decision to deny Mr. Shanoff's disability retirement application. Mr. Shanoff was one of the unfortunate Postal employees who were exposed to anthrax powder during the terrible weeks following September 11, 2001. He was promptly hospitalized and recovered, but he developed panic attacks and was eventually diagnosed with chronic post-traumatic stress disorder (PTSD) and his doctor said he could not return to work. The majority opinion of the MSPB agreed with OPM's decision to deny his application for disability retirement because "he has never seen a psychiatrist, has not consistently seen his psychologist or psychotherapist, has refused a course of treatment recommended by his psychologist, and refuses to take anti-depression and anti-anxiety medication prescribed by his physician." The ersatz Democrat, Ms. Sapin, filed a dissenting opinion reminding the majority members that Mr. Shanoff has no income and has no job, so he cannot afford the intensive therapy his psychologist has recommended. Mr. Shanoff is no less of an American hero than many other brave citizens who bore the brunt of the 9/11 attacks, and this is how the United States Government treats him?

Union Representatives: "Telecommuting" on Official Time

A recent arbitration decision takes a fresh look at a weird FLRA decision from 2004. In AFGE v. HUD, 60 FLRA No. 68 (2004), FLRA ruled that there was no legal authority in a particular statute passed by Congress promoting "telecommuting" to allow union representatives to "telecommute" if they are performing representational activity on official time. In Internal Revenue Service, 122 LA 1257 (Abrams, 2006), Arbitrator Roger Abrams helped FLRA to understand the limits of its own decision. The Arbitrator explained that the fact that the law referenced in FLRA's decision did not grant union representatives official time for telecommuting does not mean there is no way union representatives can acquire this right. The right can be acquired "the old fashioned way," through collective bargaining or through established past practice. The Arbitrator ruled that management improperly terminated a practice begun under a 2002 Memo of Agreement of permitting union representatives to perform some of their representational duties for which they are authorized official time while telecommuting.

Privacy Act

A couple of unusual rulings on the Privacy Act rights of federal employees were issued recently. In McCready v. Nicholson, 44 GERR 1063 (D.C. Cir. 2006), the employee alleged that her employer, the VA, maintained an inaccurate set of records on financial audits, which were relied upon to deny her a bonus. The VA defended on the basis that the reports were not maintained in a "system of records" accessible by her name or personal identifier. The Court ruled there is no requirement that a record be in a particular "system of records" if an employee is referring to a specific record maintained by a federal agency that was used to make an adverse determination on her.

The other case involved a Postal employee and seems odd. The case is Scott v. U.S. Postal Service, 44 GERR 1098 (D.D.C. 2006), involving a claim by an employee that she was taunted and humiliated by co-workers after her private medical information was posted by mistake in an area where employees could read it. The federal district court dismissed her Privacy Act lawsuit on the basis that her exclusive remedy is in the workers compensation laws and that she had already filed an OWCP claim on the incident. This is just plain wrong. Under this same reasoning, no federal employee could be awarded compensatory damages for

emotional distress for an EEO violation on the basis that OWCP allows claims for job-induced stress. The fact that Congress has provided one set of remedies in the workers compensation law in no way means that Congress repealed the remedies available to federal employees under other laws like the Privacy Act and the Civil Rights Act.

EEO Cases

The Seventh Circuit's decision in Phelan v. Cook County, 98 FEP Cases 1601 (7th Cir. 2006), is a welcome contrast to the MSPB's May 4, 2006, decision in Martin v. U.S. Postal Service, reported in our June 2006 newsletter. In Martin, the MSPB said the employee no longer could pursue an EEO case over his removal from employment because his union settled a related grievance and he'd been reinstated to work with back pay. The employer in Phelan said the same thing, but the Court disagreed. The fact that the employee was reinstated with back pay just two days after she was fired did not prevent her from continuing her lawsuit, said the Court, because she still had a claim against the employer for money damages for the emotional distress caused by the employer's actions.

Usually, it is the actions of supervisors or co-workers that result in holding an employer liable for sexual harassment if the employer knows about the harassment and doesn't put a stop to it. Now and then, an employer is held liable for sexual harassment inflicted by customers on its employees under the same theory. In Freitag v. Ayers, 98 FEP Cases 1547 (9th Cir. 2006), the Court found that a prison could be liable for sexual harassment inflicted by the inmates on a correctional officer. The Court agreed that some level of rude behavior "comes with the job" of being a correctional officer, but that an employee is entitled to be protected from the more extreme forms of sexual harassment and is entitled to an employer that investigates and takes some sort of corrective action on well-founded complaints of sexual harassment by the officer.

Title 38 and Arbitration: "No Man's Land"

VA health care professionals are "hanging by a thread" when they take grievances into arbitration under a labor contract. Congress back in 1990 gave the VA the authority to "pull the plug" on grievances or arbitrations that supposedly involve "professional conduct or competence" under 38 USC 7422. In AFGE Local 2152 v. Principi, 180 LRRM 2724 (9th Cir. 2006), the Court extended this "pull the plug" rule to an EEO claim that had been raised in the grievance/arbitration process. The VA doctor in that case alleged in a grievance that he was forced into retirement because of sex and age discrimination. The Court upheld the VA's power to dismiss the grievance and prevent it from going to arbitration under 38 USC 7422 even though it included an EEO claim. Had the doctor filed his case as an EEO complaint rather than as a grievance under the labor contract, however, the VA would not have been able to take this action.

Who needs "due process" if there is a good reason to fire a public employee?

The Federal Circuit issued an unnerving decision in Allen v. U.S. Postal Service, 06-3059 (October 20, 2006). This is the latest in a long line of decisions on how far the Postal Service (and any other any federal agency) can go in defending a disciplinary action against an employee based on a notice of proposed action that is almost incomprehensible or based on allegations not even contained in the proposal notice. The employee was charged with "misuse of postal funds" on the basis that he was late in paying

off his government-issued credit card for official travel expenses. The case had to get all the way to the Federal Circuit for someone to figure out that funds not being paid to a credit card company are not "postal funds" and so the accusation of "misuse of postal funds" could not be sustained. However, the Court noted that there was plenty of discussion in the proposal letter about how the employee was chronically late in paying off his credit card bill. The proposing official testified at the MSPB hearing that the employee was not being charged with late payment, but misuse of postal funds. The Court said this didn't matter since the letter discussed late payment (even though the charge itself was "misuse of postal funds") so it upheld the decision to fire the employee anyway. Next up, we predict: an employee removed on a charge of "medical inability to perform" who proves on appeal that he is "fit as a fiddle" but who's removal is upheld anyway because somewhere in the proposal letter there is a comment that he made false statements on his employment application!

"It Ain't Over 'Til Its Over"

A couple of months ago, we reported the D.C. Circuit's blockbuster decision in Murphy v. Internal Revenue Service that money damages paid for emotional distress on an EEO claim are not "income" and are not subject to federal income tax. The Justice Department has petitioned the Court to reconsider and rehear this case. We'll try to follow this one (which isn't easy, since we aren't tax attorneys!)

New Laws and Regulations

- OPM published a final rule amending the government-wide regulations on sick leave on August 17, 2006. 71 Fed. Reg. 47693. The rules amend 5 CFR Part 630 to eliminate the requirement that employees maintain a minimum sick leave balance in order to use the maximum amount of sick leave allowed for family care. A "stealth" provision amends 5 CFR 630.403 to require that "administratively acceptable evidence" for sick leave must be provided by an employee within 15 days of the date the agency requests it. Formerly, the regulation left it up to each agency to establish policy on this point.

- The FY 07 DOD Appropriations Act has a few "riders" buried in it affecting DOD employees. Section 8011 prohibits the expenditure of federal funds in FY 07 to "directly or indirectly influence congressional action on any legislation or appropriation matters pending before the Congress." Section 8019 prohibits any money from being spent on an "A-76" contracting out study if the study has taken, or is going to take, more than 24 months to complete.