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LAW FIRM NEWS

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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.

No Threat Proven; Employee Reinstated

Barrie Shapiro obtained a favorable result from Arbitrator Marshall Snider in a case involving a member of AFGE Local 1114, who was fired by the Dept of Interior on a charge that he made a threat toward his supervisor during a phone conversation with a Union representative that was overheard by a co-worker. Arbitrator Snider decided that the testimony of the witnesses was inconclusive and that there was no other independent evidence to satisfy management's burden of proving the charge by a preponderance of the evidence. Management did not appeal the Arbitrator's decision but it's not over yet, since two supervisors got restraining orders against the employee and management claims this means the employee can't return to work!

FSIP Rules in Favor of Union

We didn't know they did that any more! Congratulations to our client, AFGE Local 709 at the Federal Correctional Institution in Englewood, Colorado, for obtaining an FSIP ruling in the Union's favor on alternative work schedules. The Union proposed the establishment of a 5-4-9 compressed work schedule in a particular shop but management claimed it would cause "adverse agency impact." On January 11, 2007, the Federal Service Impasses Panel ruled that management did not substantiate this claim and ordered management to negotiate the new schedule with the Union. 06 FSIP 119. Eva Donaldson is the President of AFGE Local 709.

It Could be a Long Year at FLRA

The term of the lone Democrat on the FLRA, Ms. Carol Waller Pope, just expired, and President Bush decided to make a "recess appointment" of his nominee to replace one of the former Republican appointees instead of waiting for the Senate to act on the nomination. This leaves FLRA under "one-party rule" for the foreseeable future.

Watch This One (Another Retirement Forfeiture Bill)

It seems every session of Congress a bill is introduced to add to the number of legal grounds to forfeit a federal employee's retirement annuity. The law itself has not changed in many years and prohibits the payment of retirement annuities only on very rare grounds, such as espionage. H.R. 232, introduced by Lee Terry (R-Neb) would add convictions for other crimes as well, such as making false statements. There is some justification for such legislation, so long as it requires actual conviction of the crimes listed in the bill. Earlier bills in prior years would have forfeited retirement annuities on "charges" or "findings" rather than criminal convictions.

"Income Tax" Case to be Reheard

Last year, we reported the D.C. Circuit's decision in *Murphy v. IRS,* 460 F.3d 79 (D.C. Cir. 2006), which ruled that imposing federal income tax on the payment of money damages to an employee for emotional distress is unconstitutional. The Court ruled that money payments for emotional distress are not "income" or "gain" within the meaning of the U.S. Constitution but are simply a form of compensation to make employees "whole" for personal losses. On December 22, 2006, the Court announced it would re-hear the case after additional briefing and oral argument. Stay tuned!

OPM Final Rule on Incentive Awards

On January 11, 2007, OPM published its final rule on proposed changes to its regulations on incentive awards in 5 CFR Part 451. 72 Fed. Reg. 1267. The amendments state that a performance-based cash award may not be paid unless the employee has a rating of fully successful or better, and that there must be "meaningful distinctions based on levels of performance" (*i.e.,* employees who get more money have to have higher ratings).

MSPB is On the Loose Again

● Each month is a dangerous month for the merit-based civil service system, given the current composition of the 3-member MSPB. In January 2007, MSPB released one of its rare studies on civil service issues, this one entitled "Navigating the Probationary Period." The report expresses concern with Federal Circuit decisions in the past few years that have ruled that employees with more than one year (or two years, in the exceptive service) of continuous employment do not have to serve probationary periods again when they transfer to a new job. The study recommends that Congress amend the law to require even long-time career employees to serve new probationary periods when they take a new job, so agencies have greater flexibility to assess whether employees are suited to their new jobs (read: "so it's easier to fire these employees.") The wisdom of such a policy is far from self-evident. It could just as easily make it more difficult to recruit qualified career employees for new positions if they know they will be treated like "at-will" employees again. . . . . It was amusing (depending on your sense of humor) to compare this Report with the MSPB's decision in *Detrich v. Dept of Navy,* issued on November 16, 2006. The decision (surprise) upheld the firing of a federal employee but one of the MSPB Members put

a footnote in the decision saying that even though the agency's decision was being upheld, it should not be interpreted to mean that the agency's actions were consistent with management best practices and merit system principles. This was too much for Chairman McPhie, who issued a separate concurring opinion criticizing the footnote on the basis that MSPB lacks the general authority to review agency management practices and adherence to the merit system principles.

- The ability of federal employees to recover attorney's fees if MSPB mitigates a penalty imposed on them survived, just barely, in *Del Prete v. U.S. Postal Service,* issued on January 18, 2007. By a 2-1 vote, MSPB ruled that attorney's fees may be awarded if an agency-imposed penalty is reduced on appeal to MSPB, if the MSPB AJ finds that the agency was aware of the mitigating factors at the time it took the action but failed to take them into account. However, the MSPB announced that such a result reflects only "partial success," in that the employee prevails "only on the issue of an appropriate penalty." Therefore, the fee award must be reduced to eliminate compensation for time devoted to the unsuccessful claims. What if the employee admits the charges against him but grounds his entire appeal on the claim that the penalty is excessive? If MSPB agrees with him, has he achieved only "partial success"? The MSPB said its ruling is supported by two prior decisions (*Morey v. Dept of Navy* and *Freeman v. Dept of Veterans Affairs*) which flatly contradict it. Those decisions reaffirmed (what used to be) a well-established rule that a fee award should not be reduced for time spent on unsuccessful claims raised in the course of a single appeal on which the employee prevailed. Chairman McPhie (guess what?) dissented entirely, saying the original decision in favor of the employee was wrong and he deserved to be fired!

Retirement Eligibility as a "Proxy" for Age Discrimination

The Eighth Circuit issued an encouraging decision in *EEOC v. Independence, Missouri,* 45 GERR 75 (8th Cir. 2006), on a claim of age discrimination. In 1993, the Supreme Court declared in *Hazen Paper Co. v. Biggins,* that discrimination on the basis of retirement eligibility isn't automatically age discrimination just because older employees are more likely to be eligible to retire. However, in *EEOC v. Independence*, the Court ruled that the city's policy prohibiting employees who are eligible to retire from participating in its leave donation program was discrimination on the basis of age, given that the city's personnel director told the employee he was "too old" to qualify for donated leave. Nice to know an employer can still be found guilty of violating the law when it admits to violating the law!