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

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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.

Representing Employees Covered by NSPS

A significant number of Department of Defense employees have "spiraled" down the drain into the National Security Personnel System (NSPS) over the past few months. NSPS has not been applied to any employees in bargaining units represented by Unions, nor do we think it ever will be. Still, many employees now covered by NSPS have come to union offices for help, and a number of our local union clients at DOD installations have called us for advice on what they can do for NSPS-covered employees. First, ***organize them!!*** There are quite a few DOD installations where, for one reason or another, the professional employees are not included in the bargaining unit represented by the Union. In some cases, these employees actually voted against union representation way back when the bargaining unit was initially certified by FLRA. They would sure love to be represented by a union now! If the Union can get a 30 percent "showing of interest" from any "appropriate unit" of federal employees, the Union can file a representation petition with FLRA and FLRA will hold an election. There are a number of local unions that can double in size if they take advantage of this opportunity. Second, ***you can represent individual employees covered by NSPS, but only as a personal representative***. If the employee is not in the bargaining unit that is covered by your labor contract, he or she cannot file a grievance under the labor contract and the Union has no right to represent the employee in "formal discussions" or "Weingarten" meetings. However, any Union may decide to offer representation to an NSPS employee on an EEO complaint or an MSPB appeal or in any of the "kangaroo court" appeals available to NSPS employees. The Union may, if it so desires, insist that any NSPS-covered

employee who is furnished Union representation pay Union dues.

Good News/ Bad News On Last Chance Agreements

The MSPB issued a significant decision involving the enforcement of "last chance agreements" (LCA)in *Lizzio v. Dept of Army,* 2007 MSPB 89 (March 26, 2007). These are agreements whereby an employee agrees to give up his right to appeal a discharge for misconduct for a specific period in the future (often, for 1 year from the date of the LCA) if he is presently under a proposal or a decision to fire him for misconduct he already committed and the agency agrees to give him one "last chance" and to hold the proposed or final removal action in abeyance. The Federal Circuit upheld the validity of these kinds of agreements many years ago, but left one question unanswered: can an employee in a LCA waive his right to argue that he did not breach the agreement if he is accused of misconduct in the future? In *Lizzio,* the MSPB ruled that the answer is "no", saying it is contrary to public policy not to allow an employee to argue that he did not violate a LCA. Of course, with the current members of the MSPB, they couldn't stop there; they had to find a way to uphold that employee's removal. The MSPB ruled that the employee did not violate the LCA for the reasons given by the agency, but that he violated the LCA in other ways the agency did not rely upon. According to the MSPB, there is no "due process" requirement that an agency rely only on the conduct it accuses the employee of committing to fire an employee for violating an LCA!

Final Regulations on Compensatory Time issued by OPM

On April 17, 2007, OPM issued its final regulations implementing the 2004 law that allows GS (not WG) employees to earn compensatory time for time spent in a travel status away from the official duty station. They are at volume 72 of the Federal Register, page 19093. [The Federal Register is available online at www.gpo.gov]. A significant change from OPM's "interim regulations" is that federal agencies may no longer deduct "bona fide meal periods" from the amount of compensatory time a GS employee earns while traveling. Some of OPM's comments accompanying the final regulations are just plain weird, though. OPM says that employees cannot earn compensatory time for time spent traveling while on a federal holiday: "Although most employees do not receive holiday pay for time spent traveling on a holiday, an employee continues to be entitled to pay for the holiday in the same manner as if the travel were not required." We implore anyone who understands this to send us an e-mail explaining it. Another comment sure to provoke a lawsuit, grievance or unfair labor practice charge is: "Employees who travel while performing union activities are not entitled to earn compensatory time off because they are traveling for the benefit of the union and not for agency-related work purposes." For that portion of any travel when a union representative is on "official time" (such as travel that occurs during the employee's normal working hours when he is entitled to "official time" under the labor contract) we do not see how the union representative can be denied the benefit of the new law on compensatory time.

Hearsay Isn't Enough (For Once)

It is well-established that hearsay testimony is admissible in administrative proceedings such as labor arbitrations and EEOC and MSPB hearings. When an employer's case against an employee rests completely on hearsay, however, it raises serious "due process" concerns. Not for the Federal Circuit or the MSPB of course, but now and then for labor arbitrators. In

Minneapolis School District, 123 LA 545 (Jacobowski, 2007), a teacher was suspended for making threatening and disrespectful statements to students. The school district's evidence consisted entirely of the principal's testimony about what the students told him. The Union filed a grievance over the suspension and elevated it to arbitration. Perhaps thinking it was an MSPB hearing, the school district argued that the teacher was given the names of the complaining students and an opportunity to respond. Arbitrator Jacobowski sustained the grievance and ordered the school district to cancel the teacher's suspension, saying that while the principal's hearsay testimony was admissible, it did not carry sufficient weight all by itself to prove the school district's case.

"Past Practice" vs. the Labor Contract

Arbitrator Matthew Franckiewicz issued a thoughtful decision on the relationship between past practice and the language of a labor contract in *Borough of Plum,* 123 LA 641 (Franckiewicz, 2007). The established practice involved those situations in which police officers were entitled to compensatory time. The employer obtained a concession in the 2004 labor contract that made it harder to get compensatory time. Even so, the established practice continued and supervisors continued to grant or deny compensatory time under the old rules. When the employer decided to enforce the language of the labor contract almost two years later, the Union filed a grievance saying that the established practice could not be changed. The Arbitrator disagreed and ruled that the plain language of a labor contract overcomes a past practice, whether the practice is established before or even after the labor contract was signed. We think this is the correct decision in a case like this, in all but the most unusual circumstances.

Denial of Performance Award not an "Adverse Employment Action" Because Award was Discretionary

The "adverse employment action" doctrine continues to haunt EEO cases, even after the Supreme Court tried to bring it under control last year in *Burlington Northern Railway v. White,* 126 S. Ct. 2407 (2006). Under this popular form of "docket control" EEO complaints about "minor" matters like reassignments and performance appraisals are said not to affect an employee's "conditions of employment" and so they cannot amount to unlawful discrimination. The federal district judge's decision in *Douglas v. Jackson,* 45 GERR 491 (D.D.C., March 22, 2007), is begging to be overturned on appeal. The court ruled that a black employee with HUD was not entitled to file an EEO complaint when he his supervisor did not nominate him for a performance award, because all performance awards of that type are discretionary and not automatic. Huh? According to the court, even if his supervisor did nominate him for the award, he might not have received it anyway. Very true, but when his supervisor did not nominate him for the award he definitely did not receive it! If the supervisor did not nominate Mr. Douglas for the award because Mr. Douglas is black, that's race discrimination. "No it isn't," said the federal judge. What the judge really said was: "While adverse employment actions extend beyond readily quantifiable losses, not everything that makes an employee unhappy is an actionable adverse action." We thought race discrimination against employees made Congress unhappy, which is why they passed the Civil Rights Act in 1964.

EEO Cases

● The Eleventh Circuit's decision in *Baldwin v. Blue Cross/Blue Shield,* 100 FEP Cases 273 (11th Cir. 2007), involved an

unusual twist in the processing of a sexual harassment complaint. The plaintiff complained of sexual harassment by her manager. The company could not find enough evidence to substantiate her complaint after an investigation. The company offered to transfer her to another office, or to have a psychologist counsel both her and her manager and monitor their relationship. The plaintiff refused these offers and refused to continue working in the same office with the manager. The company fired her. The Court ruled that the company's decision to fire her was not sex discrimination and was not reprisal for having made an EEO complaint.

● *Tomassi v. Insignia Financial Group,* 99 FEP Cases 1445 (2nd Cir. 2007), is a refreshing break from the "stray remarks" doctrine, under which "smoking gun" comments showing unlawful bias and bigotry are brushed aside as irrelevant "stray remarks." The plaintiff filed an EEO complaint alleging age discrimination after she was fired for supposedly poor performance. She presented evidence that her supervisor repeatedly referred to her age and possible retirement over a three-year period. The Second Circuit reversed the trial court's decision to dismiss her complaint and sent the case back to the trial court for a jury trial.

● Another "victory" for a disabled person: the Eighth Circuit ruled in *EEOC v. Wal-Mart Stores, Inc.,* 18 AD Cases 1697 (8th Cir. 2007), that the lower made a mistake in dismissing a job applicant's case and sent the case back for a jury trial. That counts as a "victory" even though he is a long way from winning his case, since something has to count as a victory for plaintiffs who file ADA cases these days. As usual, the battle was about whether the plaintiff falls into that narrow (sometimes imperceptible) band of people who are "impaired" enough to be a "person with a disability" under the ADA but not so impaired that they are beyond "reasonable accommodation." The plaintiff applied for a position as a cashier or a greeter at Wal-Mart. He has cerebral palsy and is limited in the use of legs. Believe it or not, the Court ruled that he is a "person with a disability." Not only that, but the Court also ruled that he had presented enough evidence that he could be reasonably accommodated to be entitled to present his case to a jury. The Court said that a jury would be permitted to decide that his suggested accommodations--a special type of wheelchair and a hand scanner for the cashier position and an electronic scooter for the greeter position—fit the definition of "reasonable accommodation" and would not be an undue hardship on Wal-Mart. The mind-boggling aspect of this decision is that it had to be made at all—that the lower court had actually dismissed this man's lawsuit on the basis that there was no way he could win it under the ADA.