Minahan and Shapiro, P.C.
Attorneys at Law

Daniel Minahan

Barrie M. Shapiro

Tiffany L. Malin

MINAHAN AND SHAPIRO, PC
Attorneys at Law

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

LAW FIRM NEWS

December 2007

Our Regular Reminder

This is a reminder to all our union clients of the various services available from our law 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.

What's "The Firm" Been Doing?

Our law firm obtained some good decisions for clients in the past month or so:

☼ The Headquarters office of the Merit Systems Protection Board (MSPB) issued a decision in *Kile v. Dept of Air Force,* 2007 MSPB 260 (October 30, 2007), which ruled in favor of Robins Air Force Base (Georgia) employee Sammy Kile on his claim that his pay was improperly reduced in 2005. Many federal employees may recall the new pay law that was enacted by Congress in 2004 and caused quite a bit of confusion in the following 12 months or so on employee rights to locality pay and pay retention. Mr. Kile accepted another position on the Base in reliance on the statement in the vacancy announcement that he would retain his old rate of pay. After he took the new job, the Base told him this was no longer possible because of the 2004 law and they reduced his pay. One of our union clients, AFGE Local 987, asked our law firm to represent Mr. Kile on his appeal to the MSPB. We argued that he'd been subjected to a reduction in pay without being afforded his "adverse action rights" before this was imposed on him. The Base fought his appeal for over two years but the MSPB finally ruled that Mr. Kile should have been allowed to return

to his old job when he was told he couldn't retain his old pay in his new job. The MSPB has ordered the Base to pay him for all the pay he would have earned in the meantime, plus interest.

☼ A favorable decision was issued in another one of our cases that arose at Robins AFB. Again, with the help of AFGE Local 987, we represented a Union member at arbitration on a grievance protesting his removal from employment. The employee was fired for refusing to take a drug test. His supervisors said they had "reasonable suspicion to test him because he got angry at a co-worker. The employee was not in a "testing designated position" where he could be randomly tested. Arbitrator Samuel Nicholas ruled that management had no "reasonable suspicion" of any drug usage to justify ordering the employee to take a drug test and reinstated him to his job, with back pay. The Arbitrator also relied on a Memo of Understanding that has been in effect between the Union and the Agency since 1990 which states that any employee required to take a drug test is entitled to at least 2 hours' advance notice.

☼ A recent ruling in favor of one of our clients who worked for the Dept of Energy shows that "Guantanamo-style due process" hasn't crossed the border, yet. The employee was accused of some very serious offenses and fired. The deciding official who fired him relied entirely on a summary from an Inspector General report in which the IG investigators described what the employee supposedly did. We represented the employee on his appeal to the MSPB. The Agency persistently refused to provide the "unsanitized" IG report with all its exhibits to us in discovery, and the Agency's sole witnesses at the MSPB hearing were the IG agents, who testified as to various statements by other people and as to documents and other records they'd seen but which had never been provided to our client. An administrative judge of the MSPB's Dallas Office let this drag on through an entire hearing and even asked for written briefs from the party's attorneys. Finally, on November 19, 2007, the AJ issued a decision ordering the Agency to reverse the employee's removal from employment and to reinstate him with full back pay and benefits, on the unsurprising basis that the Agency presented insufficient evidence to prove its accusations. *Bilodeau v. Dept of Energy.* We aren't celebrating just yet. The Agency still has time to appeal the decision to MSPB HQ. We already know how MSPB Chairman McPhie will vote; if it comes to that, we hope his vote will be a dissent!

Entitlements under Travel and Per Diem Regulations May Be Grieved and taken to Arbitration

One of our union clients, the Unite Power Trades Organization, deserves credit for obtaining an excellent and important decision on the ability of federal employees to use the grievance and arbitration process under a labor contract to enforce their entitlements to travel and per diem reimbursement under applicable travel regulations. Arbitrator Joseph Weeks on November 16, 2007, issued an award granting a claim by a bargaining unit employee with the Army Corps of Engineers for mileage reimbursement which the agency had denied. Many arbitrators are reluctant to enforce entitlements outside the labor contract that can be found in various laws and regulations, but it is important that

federal employees be able to do so. One of many case decisions that shows arbitrators can interpret and enforce the federal travel regulations is *Ft. Campbell, Kentucky,* 37 FLRA 186 (1990). Congratulations to UPTO and Union Prez Travis Brock for this achievement!

MSPB Starts Cloning Adverse Action Appeals

This had to happen sooner or later. Back in 1999, the Federal Circuit suggested it might be appropriate in some cases for the MSPB to send an employee's appeal back to her employing agency for a "re-determination" of a penalty the MSPB found to be excessively harsh. *LaChance v. Devall,* 178 F.3d 1246 (Fed. Cir. 1999). Well, they finally did it in *Lock v. General Services Admin.,* 2007 MSPB 264 (November 9, 2007). Ms. Lock was removed from employment on six charges of misconduct. The MSPB sustained only two of them and, instead of mitigating the removal penalty to a lesser penalty, it remanded the appeal to GSA "to select an appropriate penalty." Now what? Ms. Lock can't appeal MSPB's decision to court because it isn't a "final decision." She can appeal GSA's *new* penalty determination to MSPB. What happens if MSPB sends it back to GSA for another "re-determination"? And has she "won" her first case so she can file for attorney's fees? Is she entitled to "interim relief" now, putting her back in a pay status while the clone of her original appeal drags on? It is unnerving to think that adverse action appeals may start to resemble VEOA (veterans preference) appeals, where federal agencies that violate the law are told only to "reconstruct" the hiring process over and over again, without ever giving a job to the employee who's rights were violated.

Duty of Fair Representation

Unions that use common sense and good judgment rarely run afoul of their legal "duty of fair representation." In *Beck v. UFCW Local 99,* 182 LRRM 3192 (9th Cir. 2007), however, the Ninth Circuit upheld a lower court's decision that the local union violated its duty of fair representation by failing to file a grievance over a written warning that ultimately led to the employee's discharge. The Court found that the local union itself had decided the case had merit and told the employee it would file a grievance for her, but it never did. Key to the court's ruling was its determination that the local union provided more aggressive representation to two men accused of the same kind of misconduct and the local union could not offer an explanation why the plaintiff, a woman, had been treated differently.

Whistleblower Protection

It's always big news when the Federal Circuit makes any favorable ruling on a whistleblower claim, even if the employee doesn't win the case outright and his appeal is simply remanded to MSPB for further proceedings. In *Reid v. Dept of Transportation,* No. 2007-3056 (Fed. Cir. November 19, 2007), the Court decided the MSPB misapplied the Whistleblower Protection Act (WPA) to Ms. Reid's case in a number of ways.

She complained of reprisal for telling her second-line supervisor that her immediate supervisor was about to break the law. Believe it or not, the MSPB said this was "unprotected" activity on her part because the supervisor hadn't broken the law yet! The Federal Circuit ruled this was a misreading of the WPA and that her activity was protected. The Federal Circuit also disagreed with the MSPB's conclusion that she could not be covered by the WPA because she reported her supervisor's misconduct only to the second-line supervisor and not to some "neutral" party like her agency's IG. Most important, the Federal Circuit stressed that Congress requires an "automatic" *prima facie* case if the whistleblower proves three facts: that she made a "protected disclosure," that the persons who retaliated against her knew about that disclosure, and that the retaliatory action happened within a fairly short time after the protected disclosure. Proof of these facts alone, said the Court, is enough to shift the burden of proof to the employing agency to prove "by clear and convincing evidence" that the same action would have been taken against the whistleblower even in the absence of her protected disclosure. The Court sent the case back to the MSPB so MSPB could apply the law correctly to her case.

What happens if you settle your MSPB appeal before the MSPB decides it has jurisdiction over the appeal?

The MSPB issued a decision helpful to appellants in *Rose v. U.S. Postal Service,* 2007 MSPB 231 (September 27, 2007). Most Union representatives know that there are certain types of cases where it's unclear whether the MSPB has "jurisdiction" to hear the case until MSPB issues its decision on the appeal. The best examples are "constructive" discharges or "constructive" suspensions, where the employee was not actually given a decision to suspend him or discharge him but he has been treated for all practical purposes as if he'd been suspended or discharged, such as an employee put on indefinite "enforced leave" due a medical condition or an employee subjected to a working environment so intolerable that he had no choice but to quit. Sometimes, an employee who files an MSPB appeal of this nature reaches a settlement agreement with his agency and the appeal is dismissed, without MSPB ever making a decision on whether the employee proved a constructive suspension or a constructive discharge. If a settlement agreement like that falls apart, the employee cannot go back to the MSPB to enforce the agreement, because the MSPB never ruled it had jurisdiction over his appeal. In *Rose,* the MSPB decided that if an appeal of this nature has been withdrawn by an employee because he entered into a settlement agreement and the agency did not live up to the agreement, the MSPB will allow the employee to re-file his original appeal.

Comic Relief

This month's comic relief wasn't very funny to the unfortunate letter carrier who is the latest victim of the infamous "adverse employment action" doctrine. This is the judge-made exception engrafted onto the Civil Rights Act, under which some employment

Issues are considered too “trivial” to concern or affect conditions of employment, even if they are discriminatory. In *Tepper v. Potter,* 101 FEP Cases 1366 (6th Cir. 2007), a Jewish employee working for the Postal Service filed an EEO complaint after the Postal Service terminated its 10-year practice of modifying his schedule so he did not have to deliver mail on Saturdays and Jewish holidays. The Court observed that Mr. Tepper was not disciplined or discharged and, even though the Postal Service ceased adjusting his work schedule, the Postal Service granted his requests for leave on Saturdays and Jewish holidays. The fact that this resulted in Mr. Tepper chewing up a considerable amount of accrued leave he once was able to keep was considered too insignificant by the Court to constitute something affecting his terms and conditions of employment. Whether Mr. Tepper was entitled to the accommodation he enjoyed for 10 years is another question, but to rule that taking that accommodation away is not something that allows him to file a complaint is, in the words of Brigadier General Anthony McAuliffe, “nuts.”