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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 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 any 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.

Tiffany, Esq. 1; Federal Agencies: 0

Congratulations to Tiffany Malin for winning her first case as an attorney! Local President Tom Scott at AFGE Local 987 asked us to help out the newly-established local union at the DECA commissary in Athens, Georgia, after one of its union stewards was removed for allegedly unacceptable performance. Tiffany traveled to Atlanta for her first "solo" hearing, and on December 17, 2007, Administrative Judge Weiss of the MSPB's Atlanta office issued a decision in favor of the union steward, reversing the agency's decision to remove him in its entirety. *Vaughan v. Dept of Defense.*

Law Firm Wins VEOA Case (Again)

On December 12, 2007, MSPB Headquarters issued a decision in favor of our client, Michael Endres, finding that the VA (of all agencies) violated his veterans preference rights when it didn't select him for a job vacancy announced to the general public. *Endres v. Dept of Veterans Affairs,* 2007 MSPB 301 (the decision is available online at www.mspb.gov). The MSPB still has a long way to go in enforcing the VEOA effectively. This is the *second* time we've won Mr. Enres' appeal, and it's probably not be over yet. On his original appeal, the MSPB AJ ruled that the VA willfully violated Mr. Endres' veterans preference rights but, consistent with the MSPB's current clueless approach to enforcing the law, ordered the VA to

"reconstruct" the selection process for that vacancy rather than simply to select Mr. Endres for the position retroactively. To nobody's surprise, the VA announced that its "reconstruction" showed Mr. Endres would not have been selected anyway (!) We filed a petition for enforcement and the MSPB AJ ordered the VA to "reconstruct" the process, again. This time the VA appealed the AJ's decision to MSPB Headquarters. The December 12, 2007, decision denied the VA's appeal, confirmed the VA's willful violation of the VEOA and (guess what?) ordered the VA to "reconstruct" the selection process. MSPB Headquarters warned that if the VA does not comply with the MSPB's decision, the MSPB will order the salary of the responsible manager withheld until compliance is achieved. Stay tuned. The VA has just asked OPM for permission to "passover" Mr. Endres—something the VA manager told the MSPB AJ she would not have done at the time of the selection but something the MSPB has now invited the VA to do!

Congress vs. Mr. Bush

Congress has now taken steps to make some long-overdue changes in legislation affecting federal employees. It remains to be seen whether the president will continue to block these improvements.

- On December 19, 2007,Congress passed and sent to the president the 2008 Defense Authorization Act (H.R. 1585). Section 1106 (at long last!) modifies the National Security Personnel System (NSPS) in just about every important way, designating the following chapters of title 5 of the U.S. Code as "non-waivable"—chapter 71 (labor relations), chapter 75 (discipline and adverse actions) and chapter 77 (employee appeals). President Bush announced on December 28, 2007, that he would not sign the bill. The year 2008 is now upon us and DOD still needs funding.

- H.R. 4089, introduced on November 6, 2007, would (at long last!) amend the 1991 VA "title 38" personnel laws to guarantee VA health care professionals access to independent review of collective bargaining and personnel decisions. No longer would the VA have final power under 38 USC 7422 to "torpedo" any collective bargaining or grievances or arbitrations involving "direct patient care" issues. Instead, VA decisions would be subject to court appeals. We hope this bill continues to move through Congress and makes it to the president's desk, and that he signs it.

"Objective Medical Evidence" not Required for Disability Retirement Annuity

The Federal Circuit issued a helpful decision on disability retirement applications in *Vanieken-Ryals v. OPM,* (No. 2006-3260, November 26, 2007). The MSPB had agreed with an OPM decision to deny Ms. Vanieken-Ryals' disability retirement application because she presented no "objective medical evidence" of her psychiatric disability. The Federal Circuit said there is no requirement in the law for that kind of evidence and that evidence of this kind is often difficult or impossible to obtain if one is disabled by mental or emotional problems.

The First Amendment Applies to TSA Employees: What a Concept!

The Ninth Circuit issued a decision on a lawsuit filed by AFGE on behalf of a TSA airport screener in *AFGE Local 1 v. Stone,* 182 LRRM 2609 (9th Cir. 2007), that would be considered unremarkable

in any but this low and dishonest decade. The screener, John Gavello, distributed and posted union literature in an effort to organize his fellow screeners. Then TSA fired him. There is no administrative grievance or appeal system available to TSA screeners so he filed a lawsuit alleging the government had fired him for exercising his First Amendment rights. The district court dismissed the lawsuit because the Transportation Security Act gives the TSA administrator discretion to hire and fire employees. The Ninth Circuit disagreed and sent the case back to the district court for a trial, on the revolutionary basis that not even Congress can prevent a public employee from having *some* access to a remedy for a violation of his First Amendment rights.

Three Good MSPB Decisions

No, that's not a misprint. Even the MSPB gets it right sometimes.

- In *Heath v. U.S. Postal Service,* 2007 MSPB 286 (2007), the MSPB took steps to try to ensure that a settlement agreement reached after an appeal has been filed can be enforced by the MSPB. Many MSPB appeals turn on whether the MSPB has "jurisdiction" over the appeal—such as an appeal by an employee claiming he was forced into retiring or resigning. Until he actually proves a "constructive discharge," the MSPB has no jurisdiction over his appeal. In *Heath,* the MSPB explained that in appeals of this nature the parties to a settlement can stipulate (meaning, agree) to facts in a settlement agreement that would establish MSPB jurisdiction. Together with the MSPB's September 27, 2007, decision in *Rose v. U.S. Postal Service* (reported in last month's law firm newsletter), this encourages settlement agreements. 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.

- The MSPB imposed a rare but effective sanction against a federal agency that refused to comply with an MSPB AJ's discovery order in *Armstrong v. Dept of Defense,* 2007 MSPB 280 (2007). The AJ ordered the agency to provide information sought by the appellant in a whistleblower reprisal case, but the agency never provided it. The MSPB upheld the AJ's decision to prevent the agency from raising an "affirmative defense" to the appellant's whistleblower reprisal claim. This meant that once the appellant established his *"prima facie"* case of reprisal (*i.e.,* that he made a disclosure of fraud, waste or abuse and his supervisors knew about it), he won his case and the agency was not allowed to present any evidence that it would have taken the same action against him even if never "blew the whistle."

- Arbitrators who are overly technical or "picky" about procedural issues are the bane of their profession, since this discourages the resolution of labor disputes on their merits and usually leads to one party or the other trying to get the same dispute resolved in another arbitration. The MSPB has the power to hear appeals from arbitration decisions in "mixed cases" (where an adverse personnel action is combined with a claim of discrimination), and in *Morales v. Social Security Admin.,* 2007 MSPB 287 (2007), the MSPB disagreed with an arbitrator's decision to dismiss a grievance over removal from employment on procedural grounds. The arbitrator ruled that the labor contract requires the grievant to make

an oral or written presentation after she files a step 3 grievance. The MSPB said the labor contract simply gives the grievant that option and doesn't make it mandatory. The MSPB sent the case back for a full arbitration hearing.

Applicant for Law Enforcement Position "Regarded as" Disabled

The EEOC issued an important decision on the coverage of the ADA in *Vavrek v. Dept of Justice,* EEOC No. 07A40068 (November 1, 2007). The case involved a DOJ employee rejected for a position because he has a heart murmur, which the agency thought might interfere with the strenuous duties of the job. Employers are often successful in arguing that an employee who is disabled or "regarded as" disabled from a particular job is not covered by the ADA because he is not completely unemployable. DOJ argued that it only disqualified the employee from being a police officer. The EEOC ruled the employee *is* protected by the ADA since the agency regarded him as incapable of performing a broad range of jobs in various classes involving heavy lifting, continuous standing, pushing, bending and reaching. The EEOC also ruled that it was improper for the agency to rely on the reports of two doctors who never examined the employee and it ordered DOJ to select the employee for the position on a retroactive basis, with full back pay and compensatory damages.

Union Dues Withholdings For Employees Temporarily Promoted to Supervisory Positions

For some strange reason, we've received a lot of inquiries recently about whether bargaining unit employees who are temporarily promoted to supervisory jobs can continue to have union dues withheld from their paychecks. The answer is "no." Many years ago, the FLRA ruled that it is a violation of the labor statute to keep an employee on dues withholding while he or she is temporarily promoted out of the bargaining unit. *VA Medical Center, Danville, Illinois,* 36 FLRA 25 (1990). This does not mean the employee cannot continue to pay union dues directly to the union; just that dues withholdings from his paycheck must cease.