

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

October 2005

Our Regular Reminder

This is a reminder to all our union clients of the various services available through 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 do not hesitate to contact us if you would like to have one of us conduct training, meet with employees or review a case for arbitration or MSPB. We are also just a phone call or a fax away if you need help or feedback researching any legal issue on federal sector employment. We also 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 attorneys fees from the agency if we win. Check out our website at <http://minahan.wld.com>.

Real Civil Service Reform

We've received lots of feedback on our very own legislative proposal for a completely new civil service law covering all federal employees. Keep those comments coming! We appreciate all the comments we've received, both positive and negative, since they help us to fine-tune our proposal. We call our idea for new legislation The Modern System, MS.1. If you like it, tell your

congressional representative to check it out. We've posted it on the home page of our law firm website – <http://minahan.wld.com>.

EEO Cases

- In *EEOC v. Sears, Roebuck Inc.*, 16 AD Cases 1761 (7th Cir. 2005), the court ruled that a department store employee with neuropathy in her leg proved that she was a "person with a disability" entitled to reasonable accommodation, since her right leg and foot became numb after walking for even a short time, which caused her to walk very slowly.
- The Third Circuit has now joined two other courts of appeals in ruling that a federal employee who takes her EEO complaint into federal court must try the entire case from the ground up. *Morris v. Rumsfeld*, 16 AD Cases 1852 (3rd Cir. 2005). The employee had filed her case in federal court seeking to preserve the EEOC's administrative finding of discrimination while arguing that the damages awarded to her were insufficient. According to the Third Circuit, the federal employer must be

found guilty all over again before the issue of damages can be reached.

- The never-ending struggle to deal with the simple concept of “causation” continues in EEO reprisal cases. An encouraging development was the recent decision in *Gilooly v. Missouri Dept. of Health and Senior Services*, 96 FEP Cases 659 (8th Cir. 2005). The employee in that case complained he was being sexually harassed by two female coworkers. The employer undertook an internal investigation, decided that the employee was lying, and fired him. The court overturned the termination and ruled in the employee’s favor, correctly stating that the employee never would have been fired without complaining about a violation of his civil rights. This is a nice contrast to *Vasconcelos v. Meese*, 907 F. 2d 111 (9th Cir. 1990), a decision which found no unlawful reprisal when a federal employee alleged sexual harassment but the employer, after conducting an internal investigation, decided she was lying and disciplined her. In that case, the court said that while she was protected for the filing of her EEO complaint, she was not protected when she repeated the allegations in that EEO complaint during an internal employer investigation.

Weingarten Violation

Here’s an interesting example of an employer shooting its own case in the foot. In *Chicago Transit Authority*, 121 LA 478 (Wolff, 2005), a bus driver found a wallet on her bus, took the money from the wallet and then gave the wallet to “lost and found.” The owner complained there was \$340.00 in the wallet, the employer reviewed a videotape from a security camera which showed the bus driver picking up the wallet and taking out the money. The employer called the bus driver in

for a meeting and asked whether she knew what happened to the money. When she said she had no idea, she was fired. Arbitrator Wolff ordered her to be reinstated (though without backpay), saying that she had no idea the interview would be disciplinary in nature and that she certainly would have requested a Union representative if she did. The Arbitrator stressed that the employer itself said it was not just the theft but also the employee lying about it which got her fired. The lesson for employers is not to play these kinds of games with employees. If the employee is guilty and you’ve got the evidence, just go ahead and take the appropriate disciplinary action!

MSPB’s Boston Tea Party

For an agency that thinks videoconference hearings are as good as real hearings, this next case probably should not come as a surprise. On September 27, 2005, the MSPB reached a new low in *Johnston v. Dept. of Treasury*. Ms. Johnston is one of the select group of employees who actually won her appeal to MSPB, with the MSPB reversing her removal from employment. More than three years later, the MSPB finally ruled on whether her employer fully complied with the MSPB’s decision. She said her employer deducted too much from her backpay award for federal and state taxes. The MSPB said, “the Board does not get involved with tax disputes regarding backpay.” What?! The decision references one of its earlier decisions, the *Cuevas* case, to support this remarkable statement. But the *Cuevas* case involved a completely different point, which was whether the MSPB will adjust an award of backpay upward to compensate for an employee’s additional tax liability from receiving backpay for multiple years in a single tax year. (Few agencies or courts are willing to grant that type of remedy). To tell a reinstated employee “that’s not our department, go complain to the IRS,” when the employee says that the tax withholdings from his backpay are the wrong amounts is

ridiculous. There is a solution, and we urge all our Union clients and friends to give it a try the next time you represent someone who is entitled to backpay. Even though the OPM regulations on backpay allow for withholding taxes from backpay, the Backpay Act itself, 5 USC 5596, says nothing about taxes. A very interesting decision of a federal judge in Pennsylvania some years ago ruled that an employer cannot withhold taxes from backpay, on the basis that the Internal Revenue Code authorizes tax withholdings only from pay for services actually performed by the employee. *Churchill v. Star Enterprises*, 3 F. Supp. 2d 622 (E.D. Pa. 1998). Try this on your next backpay case and watch the fur fly.

FLRA Cases

- It is rare for FLRA to modify or reverse an arbitrator's award which a Union, rather than a federal agency, has appealed. It happened in *EEOC*, 60 FLRA No. 121 (2005) where an arbitrator denied a grievance filed by employees who wanted overtime pay instead of compensatory time for overtime work. The FLRA clarified that, for FLSA non-exempt employees (most WG employees and most GS employees at GS-9 or below) the choice as to whether to accept compensatory time or overtime pay rests exclusively with the employee.
- It happened again in *FDIC*, 60 FLRA No. 139 (2005), where an arbitrator denied a grievance in which the employee claimed he should have been reassigned to a vacant position. The employee's job had been identified as "surplus" and the labor contract required that such employees to be given priority for reassignment to vacant positions that are funded and not "surplus." The arbitrator found that it would be contrary to management's rights to order management to select a particular employee for a particular

position. The Authority reversed, saying that the labor contract clearly required this result. The Authority agreed that an order directing management to select a particular employee for a particular position affects management's rights but noted that the relevant section from the labor contract was an "appropriate arrangement" for employees whose positions had been identified as "surplus" and so the arbitrator should have enforced the labor contract.

- Another encouraging decision was issued in *Internal Revenue Service*, 60 FLRA No. 141 (2005). It involved an employee who settled a previous grievance over non-selection for a promotion in return for a promise of priority consideration on the next promotion opportunity. When the employee was not selected for the next opportunity, he filed a grievance, and the arbitrator not only agreed that the employer failed to give him priority consideration but also ordered the employer to promote the employee retroactively to the position with backpay. The federal agency appealed on the basis that this interfered with its right to make selections from any appropriate source. The Authority upheld the arbitrator's award, however, saying that the arbitrator's interpretation of the labor contract to require a selection where a person with priority consideration meets the minimum qualifications for the promotion and the employer has no justifiable reason for not selecting him was a reasonable interpretation of the labor contract and did not violate management's rights.
- In *Keesler Air Force Base, Mississippi*, 60 FLRA No. 83 (2004), the Union had everything it needed to get an employee a retroactive, temporary promotion, except one important thing.

The Union proved that the grievant was assigned to higher graded duties, had all the basic qualifications needed to hold the job at the higher grade and was not paid for the higher graded work. The arbitrator granted the employee a retroactive, temporary promotion, but the FLRA reversed. The problem was that there was no part of the labor contract that required temporary promotions for employees performing higher graded work, and general provisions in the contract about fair and equitable treatment and equal pay for equal work are not enough to create this right in themselves.