

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

November 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>.

Final NSPS Regulations

What should you do after key parts of your regulations for a new personnel system in one federal agency have been enjoined by a federal judge and Congress won't even fund the rest of it? That's easy: issue final regulations for a new personnel system in a second federal agency that are basically the same as the regulations that got enjoined. (You don't have to learn from your mistakes if you don't ever make mistakes!) The

Department of Defense has just issued its final regulations for its National Security Personnel System (NSPS). We review the new NSPS regulations briefly in an article attached to this newsletter.

EEO – Just Skip to the Last Step

It was only a matter of time before the MSPB issued a decision like *Simien v. U.S. Postal Service*, on July 15, 2005. No staunch defender of the *status quo* has ever been able to tolerate the Supreme Court's 1973 three-step "*McDonnell-Douglas*" analysis for proving discrimination. Step 1 requires the employee to establish a *prima facie* case (or, inference) of discrimination by proving certain facts. Step 2 requires the employer to introduce at least some evidence that it had a non-discriminatory reason for its action. At step 3, the employee is allowed to prove discrimination indirectly by convincing a judge or a jury that the explanation offered by the employer at step 2 is completely baseless. Joining a host of other reactionary institutions that have misread a 1983 Supreme Court decision (*U.S. Postal Service Board of Governors v. Aikens*), the MSPB now says that whether the parties have carried their respective burdens at step 1 and step 2 of the "*McDonnell Douglas*" analysis means nothing once a full hearing has been held. Instead,

the MSPB's attitude is "let's just get on with doing what we should have done at the first step, which is making up our own minds about whether we think discrimination occurred or did not occur." The upshot, of course, is that the employee derives no benefit from the inference of discrimination established by a *prima facie* case and, even better for the defenders of the *status quo*, the employer doesn't get pinned down to any specific reason for its decision, leaving the employee with a moving target or no target at all to try to knock down. Proving discrimination indirectly through the employer's failure to present evidence of a non-discriminatory reason for its decision, or through showing that reason to be completely false, thus becomes impossible. Proponents of this "let's just get to the bottom line" approach tend to overlook the Supreme Court's 2000 decision in *Reeves v. Sanderson Plumbing Co.*, that "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Until MSPB decides to follow the law, the "*McDonnell-Douglas*" test for proving discrimination will be denied to employees in MSPB appeals, replaced by the "bottom line" approach, under which the MSPB simply has to decide whether it thinks discrimination did or did not occur.

More Protection for Whistleblowers at DOL

Thanks to Dave Christenson at AFGE Local 3607 (EPA Denver) for bringing some lesser-known whistleblower protection laws and regulations to our attention. A number of environmental statutes, such as the Clean Air Act, the Safe Drinking Water Act and the Toxic Substances Control Act, contain provisions to protect employees who report violations of those laws. This includes not only employees of polluters but also employees of

watchdog agencies and, in many cases, all federal employees. Enforcement of these whistleblower protection laws is not entrusted to the Office of Special Counsel but rather to the Department of Labor, which has an Administrative Review Board (ARB) where affected employees can file complaints and receive hearings from administrative law judges. The regulations for filing and processing such complaints are at 29 CFR Part 24.

Prior Discipline May Not be Relied Upon but it Can be Relied Upon (Huh?)

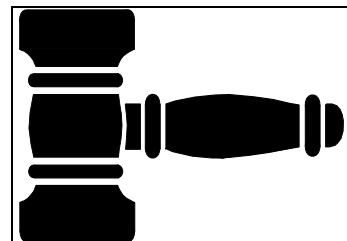
The Federal Circuit is on the loose again. Its decision in *Shabazz v. Dept. of Justice*, issued September 30, 2005, involved an employee removed from employment for alleged misconduct. The employee had a prior disciplinary action a number of years ago but the employer had a rule stating that prior discipline more than a certain number of years in the past will not be relied upon to support "progressive discipline" for any new offense. No problem for the Federal Circuit. The fact that the employer was prohibited from considering the prior discipline as part of her disciplinary history did not mean that the employer was unable to rely on the prior discipline as proof that the employee was clearly on notice of the rule she violated, which made her latest offense much more serious. So what's the point of an agency regulation establishing a "reckoning period" for reliance on prior discipline? Don't ask. The only good thing about this decision is that it is not a "published" decision so it is not considered to be binding precedent.

***Is Your Employer Entitled to Know
Everything About You?***

The Seventh Circuit issued an interesting decision concerning a public school teacher whose contract was not renewed after he refused to sign a form authorizing the release of “all information” about himself. *Denius v. Dunlap*, 209 F. 3d 944 (7th Cir. 2000). The Court said that public employers have a legitimate interest in collecting information about their employees, but there must be some business-based need for the information obtained. The release form in that case was written so broadly that it covered attorney-client communications, all financial information and all medical records. The court ruled that the First Amendment protects a public employee from being disciplined or discharged for refusing to provide confidential information about himself unless the employer provides a sufficient justification for insisting on that information.

***Agreement on “Cut-Off Score” is
Enforceable in Arbitration***

The decision in *Internal Revenue Service*, 61 FLRA 226 (2005), involved a negotiated agreement whereby the agency promised to eliminate a cutoff score for determining qualified job candidates under a particular merit selection process. After the agency unilaterally implemented a cutoff score with respect to a particular vacancy, the union filed a grievance and an arbitrator ruled in the union’s favor. The FLRA upheld the arbitrator’s award, saying that neither the negotiated agreement nor the arbitrator’s award interfered with management’s right to select candidates from any appropriate source. The agency was bound only to consider additional candidates, not to select any of them, the FLRA ruled.



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

November 1, 2005

NSPS Final Regulations: *Déjà vu* all over again?

Last Thursday the Department of Defense released the final regulations for its “National Security Personnel System,” which was authorized by Congress in 2003 (5 USC Chapter 99). The final regulations will be published this week in the Federal Register. They will also be included in the next annual edition of the Code of Federal Regulations, as 5 CFR Part 9901.

DOD issued its proposed NSPS regulations on February 14, 2005. The proposed NSPS regulations were modeled on the final regulations issued on February 1, 2005, by the Department of Homeland Security (DHS), the first agency allowed by Congress to establish its own personnel system. A lot has happened since February 14, 2005. Most significant, of course, is the decision of Judge Collyer of the federal district court in Washington, D.C., to permanently enjoin the labor relations and appeals provisions of the DHS regulations. The Bush administration has another month or so to decide whether to appeal Judge Collyer’s decision.

Neither DOD’s comments accompanying its final NSPS regulations nor the regulations themselves refer to Judge Collyer’s decision. However, DOD modified some sentences of its

proposed regulations that were identical to the portions of the DHS regulations invalidated by Judge Collyer. DOD presented these changes more as “clarifications” than changes. For the most part, the final NSPS regulations are identical to the proposed regulations.

The final regulations are an abomination, no matter whether you are an employee, a supervisor or a manager. They are enormously complex, but at the same time incredibly vague. Career employees still have no idea what will happen to their most basic conditions of employment, such as how much they will get paid. DOD promises “issuances” or “implementing issuances” on pay and many other topics in the future. While revealing only the broadest outlines of its policy on pay, promotions and layoffs, the final regulations adopt the same petulant tone of the proposed regulations in “settling some old scores” with FLRA and MSPB. You might not know what your base salary will be or what kind of premium pay you will or will not receive, but DOD has succeeded in narrowing the conditions under which it will have to invite union representatives to “formal discussions,” it has ensured that union representatives can no longer avoid discipline for unacceptable behavior in grievance meetings or in collective bargaining sessions by claiming the right to “robust debate,” it has told the MSPB that it cannot force DOD to talk about settlement in an employee appeal and that the MSPB cannot reverse an action against a DOD employee based on the way a charge is “labeled” so long as “the employee has sufficient notice to respond to the charge” (meaning an employee can be disciplined for “theft of government property” even if the employee did not intend to steal the property and even if the property was not government property).

We think the final NSPS regulations are in some respects unconstitutional or contrary to federal law, and in all respects they are bad personnel policy. The most immediate question is whether DOD's “clarifications” will save the NSPS regulations from the same fate that befell the DHS regulations.

DOD made one change to the subpart of the NSPS regulations that covers labor relations. Its proposed regulations were nearly identical to the labor relations subpart of the DHS regulations. Judge Collyer ruled these regulations did not preserve collective bargaining, since they allowed DHS to refuse to bargain or to repudiate a negotiated agreement for just about any reason at all. DOD's "fix" was to "clarify" that there will be a difference between the "issuances" it publishes later and the "implementing issuances" it publishes later, with the result that portions of a labor contract that conflict with the "issuances" may remain in effect until the original term of the labor contract expires. DOD either forgot or doesn't care that Judge Collyer's decision was based on more than just one section of the DHS regulations that allowed for DHS to invalidate labor contracts. She also decided that by crafting a "management's rights" section that reserved to management the right "to take whatever other actions may be necessary to carry out the Department's mission" and by dictating to FLRA the scope of its ability to review DHS labor relations decisions, the concept of collective bargaining was nothing but an illusion. The final NSPS regulations contain these same provisions, borrowed almost word-for-word from the DHS regulations.

DOD made one change to the NSPS regulation on the ability of MSPB and labor arbitrators to reduce a disciplinary penalty imposed on an employee. The proposed regulations, just like the DHS final regulations, allowed for a penalty to be reduced "only if the penalty is so disproportionate to the basis for the action as to be wholly without justification." Did DOD decide to return to the long-established "*Douglas Factors*"? Nope. Instead, DOD's final regulations say that a disciplinary penalty may be reduced on appeal to MSPB or to arbitration only if the penalty is "totally unwarranted in light of all pertinent circumstances." While its true that you never know how a federal judge is going to interpret something, anybody who thinks this means something different than the language in the proposed NSPS regulations is living in a parallel universe.

And so the battle continues, with real civil service reform still a distant dream.