

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

March 2007

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>.

Deadline Matters for Management, for Once

Barrie Shapiro obtained a positive decision from Arbitrator Thomas Christopher in a case involving a member of AFGE Local 2382 at the VA Medical Center in Phoenix, Arizona. The Union filed a grievance for the employee, challenging a 14-day suspension

imposed on him as unjustified. Management missed the deadline in the labor contract for issuing a step 2 grievance decision. The VA-AFGE labor contract says that if management is untimely in issuing a step 2 or step 3 decision, the grievance shall be granted and the employee shall be given the remedy sought in the grievance if it is lawful and reasonable. Labor arbitrators and the FLRA have been "ducking" this part of the labor contract almost every time they face it. Yet Arbitrator Christopher on February 15, 2007, ruled that the labor contract is clear and ordered the VA to grant the employee's grievance, with back pay.

Is a Reduction in Pay a Reduction in Pay? Round 2

An AJ in MSPB's Atlanta office issued a decision in favor of the employee in one of Dan Minahan's cases on February 22, 2007: *Kile v. Department of the Air Force*. The case has been very troublesome to MSPB HQ because they can't figure out a way to rule against the employee. It involves the 2004 Federal Workforce Flexibility Act, commonly known as the "Federal Employee Pay Screw-Up Act," under which Congress made some arcane changes to some obscure laws on

“basic pay,” “locality pay” and “retained pay.” Mr. Kile was one of a number of federal employees who accepted new jobs around the time the law went into effect and was later told that his new rate of pay was “illegal” under the new law and had to be reduced. The MSPB AJ’s first decision ruled that, under well-established case precedent, Mr. Kile’s acceptance of a position based on misinformation provided by his agency on the pay rate of the new position was an “adverse action” under 5 USC 7512 and had to be reversed, enabling him to return to his former position. The Air Force appealed. MSPB HQ on November 21, 2006, issued a decision almost as strange as the 2004 law, sending the case back to the AJ for further findings on which definitions of “pay” in which regulations should be applied. The AJ’s February 22, 2007, decision ruled in Mr. Kile’s favor again. The AJ noted that Mr. Kile does not want the pay of the new job, whether it is legal or illegal; he wants his old job back. Once again, the AJ ruled Mr. Kile was entitled to be returned to his old job since he took the new job based on misinformation provided by the Air Force about what he’d be paid in the new job. Will the Air Force appeal? As long as MSPB Chairman McPhie is there, why not?

“McDonnell-Douglas” Still Applies (Sometimes)

On January 20, 2007, EEOC issued a decision on the appeal of an employee whose removal had been upheld by the MSPB: *Heffernan v. Dept of Health and Human Services*, EEOC No. 0320060079. The employee claimed discrimination on the basis of religion. He pointed to another employee who engaged in similar behavior but who was not disciplined at all. The MSPB AJ said that was an “irrelevant” comparison because the other employee got no discipline instead of less discipline. (We are not making this up!) The EEOC examined all the evidence and concluded that the employee was the victim of discrimination based on his religion. In the

process, the EEOC applied the classic “*McDonnell-Douglas*” 3-part analysis, under which an employee first establishes a *prima facie* case of discrimination, the employer then puts forth a non-discriminatory reason for its decision and, at the final step, the employee can win by showing that the employer’s explanation makes no sense, leaving the inference of discrimination raised by the *prima facie* case as the most likely explanation for the employer’s action. The EEOC made no mention of the MSPB’s trashing of the Supreme Court’s “*McDonnell-Douglas*” test in MSPB’s *Simien* and *Paris* decisions, addressed in our November 2005 and January 2007 newsletters. The *Heffernan* decision has been referred back to MSPB to see whether MSPB will accept the EEOC’s decision. Wonder what’ll happen next?

Unconstitutional Penalty

A recent decision by the Supremes on a personal injury lawsuit may have some implications for public employee discipline cases down the road: *Philip Morris USA v. Estate of Williams*, decided on February 20, 2007. It’s nice to know the Supremes have some sense of fundamental fairness after all, at least when the defendant is cigarette manufacturer Philip Morris. The Oregon Supreme Court had upheld a jury award against Philip Morris on behalf of a smoker who died before the lawsuit was over. The jury awarded the smoker’s estate \$79.5 million in punitive damages. The Supremes, by a 5-4 vote, declared this award is so excessive that it violates Philip Morris’ right to “due process” under the U.S. Constitution. It’s a heart-warming decision in the face of so many MSPB and court decisions that say “due process” for federal employees means nothing more than getting advance notice of the charges and an opportunity to respond before they are fired. “Substantive due process,” under which the result must meet minimum standards of fairness, as well as the process leading to that result, still lives!

**38 USC 7422 Has Gotta Go
(The “Trojan Horse” for Labor Relations
in the VA)**

When Congress tried to reconcile collective bargaining and union representation with the laws covering VA health care professionals in 1990, it included 38 USC 7422 in the law, which allows the VA to “pull the plug” on any grievance or collective bargaining if the VA determines it involves employee compensation or direct patient care. The FLRA and the courts have interpreted this law as having no limits at all. In *AFGE Local 446 v. Nicholson*, 181 LRRM 2133 (D.C. Cir. 2007), a labor arbitrator granted a union grievance on behalf of nurses at a VA hospital who worked nights and weekends and were not paid night pay or weekend pay. The VA never bothered to appeal the arbitrator’s award to FLRA. Instead, once the Union complained that the VA was refusing to comply with the arbitrator’s final decision, the VA’s Central Office declared the award invalid under 38 USC 7422. The D.C. Circuit upheld the VA’s decision. It is unlikely that Congress intended no limits at all on the VA’s power under section 7422. New legislation to clarify this is badly needed.

Official Time: “Why do you want it?”

It’s annoying enough when management tells the Union it hasn’t sufficiently explained a “particularized need” for a data request under the federal labor law. The grievance in *U.S. Border Patrol*, 122 LA 1547 (Gentile, 2006), involved a supervisor who refused to grant official time to a Union representative without a more detailed explanation of what the representative was going to use the official time for. The arbitrator ruled that the labor contract applicable to those employees did not entitle the supervisor to request or obtain this information.

**No “Reasonable Suspicion” for
Mandatory Drug Tests**

The arbitration decision in *U.S. Enrichment Corp.*, 123 LA 44 (Cohen, 2006), involved an employer that ordered 12 security officers and 11 other employees to submit to drug testing after a bag containing drug paraphernalia was found inside the secured entrance to the facility. One of the employees tested positive and was fired. The Arbitrator reversed the termination and directed the employer to reinstate the employee with full back pay. The employees were not part of a random drug screening program, and the presence of the bag on employer property was not enough in itself, said the Arbitrator, to cast suspicion on all the employees who worked in the area.

MSPB Lowlights

No federal agency charged with protecting federal civil service rights and benefits has gone farther into the *bizarro zone* than the MSPB. Each month brings a new crop of decisions that are more than just wrong.

- *Talavera v. Agency for International Development*, issued on January 9, 2007, ruled that it was no violation of the appellant’s due process rights for the deciding official to justify his selection of the penalty of removal by considering that the appellant made false statements in her written reply to the proposal to remove her. No joke.

- *Oates v. Dept of Labor*, issued on February 12, 2007, denied an employee’s appeal from an arbitrator’s award finding no EEO discrimination in a 25-day suspension imposed on him. The shocker was the MSPB’s agreement with the arbitrator that the employee is not owed interest on his back pay award since the arbitrator reduced the suspension to a 13-day suspension. According to the MSPB, the Back Pay Act (which requires interest) applies only when an

arbitrator completely reverses an action against an employee, not when an arbitrator reduces the severity of the discipline. No joke.

- MSPB's decision in *Thompson v. Dept of Air Force*, issued on January 25, 2007, comes close to turning all federal employee adverse action appeals into "Egan" cases. *Dept of Navy v. Egan* is the 1988 Supreme Court decision that ruled that if a federal employee is fired for loss of a security clearance, neither the MSPB nor an arbitrator are allowed to inquire into why the employee lost his clearance; they are limited to making sure the employee got advance notice of the proposal to fire him for loss of the clearance and an opportunity to reply to the proposal before he was fired. Until recent years, the MSPB in a series of decisions had ruled that *Egan* was limited to security clearances. More recently, without ever mentioning or overruling those cases, the MSPB has upheld all sorts actions against federal employees based on loss of agency-conferred "credentials" or "certificates." In *Thompson*, the employee was fired because he did not maintain his "air traffic control certificate." The MSPB AJ ruled in favor of the employee on the basis that there is no law or regulation requiring employees in his position to hold this certificate. MSPB HQ disagreed, upholding the employee's removal solely on the basis that he did not possess a certificate his employing agency wanted him to possess. No joke.

EEO Cases

- The D.C. Circuit issued a favorable decision in the ongoing debate over whether employees have been subjected to an "adverse employment action" important enough to allow them to file an EEO complaint. In *Czekalski v. Peters*, 99 FEP Cases 1121 (D.C. Cir. 2007), an FAA employee filed a complaint of sex discrimination after she was reassigned to another management position. The agency argued that no "adverse employment action"

occurred because her salary, grade level and benefits did not change. The court ruled her reassignment from a position with a \$400 million budget supervising 960 employees to a position supervising fewer than 10 employees was significant enough to make it illegal if she could prove it was based on her gender.

- The Third Circuit issued an important reminder that qualifications for the job sometimes don't mean much when an employee files a complaint alleging discriminatory non-selection for a promotion. Normally, part of complainant's *prima facie* case is showing that she met the basic requirements to hold the job for which she applied. However, in *Scheidemantle v. Slippery Rock University*, 99 FEP Cases 673 (3rd Cir. 2006), the complainant proved that the two men hired for the job vacancies did not meet the posted qualifications either. In this situation, said the court, the complainant's lack of qualifications for the job is not a defense to her complaint of sex discrimination.