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 2006

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

Security Clearances

Any federal employee who is required to hold any level of security clearance in his or her job, particularly DOD employees, should be aware of the new "adjudicative guidelines" issued by DOD for security clearances. The guidelines were published in the August 30, 2006, issue of the Federal Register (71 FR 51474), which can be accessed online at www.gpo.gov. They will replace the current guidelines at 32 CFR Part 154. These guidelines have been in use for many years and are routinely updated every few years. They focus on a number of personal characteristics, such as financial history, drug or alcohol abuse and criminal conduct.

Creative Data Request: Access to an Employer's Facility

A union in the private sector succeeded after making a request for information that did not involve documents or records, but rather the opportunity to access the employer's facility. The union filed a ULP charge alleging that it had a legitimate need for one of its consultants to visit the plant to conduct a time and motion study on the forklift drivers. The NLRB agreed that the employer's refusal to permit this access was a ULP. *Nestle Purina Petcare Co.,* 180 LRRM 1137 (2006).

FLRA General Counsel: 'We are changing our ways on how we handle ULP charges.'

FLRA's new General Counsel, Colleen Duffy Kiko, announced at a conference of labor relations professionals on September

11, 2006, that the FLRA Regional Offices will be taking a different approach to how they process ULP charges. Her remarks were summarized in the September 19, 2006, edition of BNA's Government Employee Relations Reporter. Ms. Kiko declared that charging parties (that means you!) need to take more responsibility for providing FLRA with relevant documents and specific information on potential witnesses. "Do not expect the FLRA to develop the charge for the parties, "she said, "Our job is to investigate the allegations brought to us as to whether they are factual and to determine if they violate the Statute." Ms. Kiko also said she wants to eliminate the delay that often occurs between a Regional Director deciding to issue a complaint on a ULP charge and the issuance of the complaint itself. In the past, she noted, the regional offices have spent a lot of time trying to work out settlement agreements in these situations, but Ms. Kiko declared that if no settlement has been reached within 1-2 weeks after a decision to issue a complaint has been made, the complaint should simply be issued and settlement negotiations can continue after that.

Mistreatment of the Union can be habit-forming

On August 10, 2006, an FLRA Administrative Law Judge (ALJ) issued a decision ruling that BOP's Federal Correctional Institution in Elkton, Ohio, committed a ULP in the way it responded to the Union's request for information. *Dept of Justice, FCI Elkton, Ohio,* FLRA No. CH-CA-05-0294. Agency management unreasonably delayed in responding to the Union's request, and when it did, the response was incomplete and misleading. Said the ALJ: "This case serves as a checklist of things an agency should not do in responding to an information request. . . the Respondent exhibited a complete and total disregard for the law governing labor relations in the federal sector that is difficult to understand given its federal law enforcement mission." FLRA can't claim they didn't see this coming. On February 10, 2006, the Authority issued its decision in (guess where?) *Dept of Justice, FCI Elkton, Ohio,* 61 FLRA No. 97 (2006) [which qualified as the "bonehead decision of the month" in our April 2006 Law Firm Newsletter]. The Union in that previous case filed an unfair labor practice charge alleging that the Union Chief Steward had been transferred to another part of the Institution because of grievances he filed over 2 performance log entries. The FLRA found no ULP despite the fact that the Warden told the Union President that the Chief Steward's transfer was "what Todd gets for filing all of those petty allegations." According to the Authority, this remark more likely referenced the substance of the Chief Steward's allegations rather than his protected union activity. So, the filing of the grievances was protected but what was written down on the grievance forms was not protected? The logical next step? ". . . A complete and total disregard for the law. . ."

"Word to the Wise" on Data Requests

Back on the subject of data requests by federal sector unions to agency management, we get questions regularly on the "Privacy Act Excuse" for refusing the provide data to the Union. The Privacy Act (5 USC 552a) is a red-herring. The reason is that the Privacy Act itself allows the disclosure of any record covered by the Act if the particular disclosure would be a "routine use" of that record. Every federal agency responsible for gathering and maintaining every kind of personal record has published "routine use" regulations that either expressly allow disclosure to federal sector unions when needed by the Union to carry out its representational responsibilities, or more generally allow disclosure to any party in a case involving a federal agency. Every Union local should have a copy of the court decision in *Air Force v. FLRA,* 104 F.3d 1396 (D.C. Cir. 1997), which explains this clearly and in detail.

However, do not abuse any "routine use" disclosure you receive from the agency! If management provides the Union with Privacy Act records, *store them in a secure manner and use them only for the Union representational purposes for which they were requested*. Don't make extra copies. Don't take them away from the Union office without keeping them secure. Don't share them with an employee or an employee's personal attorney who has some unrelated case pending against the agency. True, unions can't be sued for violating the Privacy Act, but if management finds out that the Union has been disseminating "routine use" disclosures, they would probably be justified in putting conditions on, or even refusing, further "routine use" disclosures to the Union.

Whistleblower Cases: One step up; one step back

The Federal Circuit issued a rare decision in favor of whistleblower protection in *Greenspan v. Dept of Veterans Affairs,* No. 05-3302 (September 8, 2006). Dr. Greenspan was issued a letter of reprimand and a reduced proficiency rating for some blunt remarks he made to a management official in front of other staff about what he believed was nepotism in certain personnel decisions and about hospital hiring practices that were designed to circumvent the veterans preference laws. The MSPB (naturally) ruled against Dr. Greenspan's complaint of whistleblower reprisal because of the "rude and disrespectful" way he expressed his comments. The Federal Circuit came to the stunning conclusion that employees who think management is defrauding the taxpayers or violating the law have a hard time being "nice" when telling this to management. Thankfully, the Federal Circuit ruled there is the same sort of "robust debate" privilege for whistleblower disclosures that applies to Union representatives- that there has to be some leeway for criticism when critical comments are being made. The Court said, "When a disclosure is of protected subject matter, it is more likely than not to be critical of management, perhaps highly critical."

Maybe the hapless employee in *Chambers v. Dept of the Interior,* 2006 MSPB 279 (September 21, 2006) will appeal to the Federal Circuit. The appellant was the Chief of the U.S. Park Police for the Department of the Interior. She made a statement to *The Washington Post* to the effect that the Park Police were so short-staffed that it was endangering public safety. She was fired. One of the charges against her (and we are not making this up) was "making public remarks regarding security on the federal mall, in parks, and on the parkways in the Washington, D.C., metropolitan area." The MSPB upheld the decision to fire her and ruled that her statements were not protected "whistleblower disclosures" but rather mere "policy disagreements" with her superiors. The ersatz Democrat on the MSPB, Member Sapin, filed a tepid and prolix dissent, taking the better part of 20 pages to say that a disclosure of information that an employee reasonably believes shows "a substantial and specific danger to public health or safety" is, word-for-word, exactly what the Whistleblower Protection Act protects. That's what Congress thought too.

MSPB Cases

- Is there any procedural protection a federal agency can violate that will warrant reversal of its decision to fire an employee? At the MSPB the answer has always been, and continues to be, "basically, no." In *Gilmore v. U.S. Postal Service,* 2006 MSPB 267 (2006), the Postal Service, in the course of firing an employee, failed to provide the employee with copies of the documents it was relying upon to support the charge against her, failed to provide her with proper notice of her right to make a written and oral

response to the proposed removal, and failed to give her adequate time to prepare and present her response. In effect, the MSPB said, "no harmful error; she was guilty anyway."

- In *Mansfield v. National Mediation Board,* 2006 MSPB 227 (2006), the MSPB refused to enforce a settlement agreement between an appellant and an agency on the basis that it was an "artifice" designed by both parties to misuse the laws and regulations on the Intergovernmental Personnel Act (IPA): basically an agreement to enable the appellant to obtain an IPA assignment she was not qualified to obtain. The MSPB's decision in this particular case is hard to argue with, since the whole settlement agreement looks like it was a sham. However, there are some comments in the MSPB's decision that have disturbing implications for future cases. The MSPB condemned the settlement agreement because the parties were creating a "fiction" that something which never occurred did occur. In reality, this is the basis of many settlement agreements, which, for example, change an employee's involuntary removal to a resignation or require the agency to effect a retroactive promotion. This is also the basis of real remedies when employees (now and then) win MSPB appeals: the agency is ordered to make the employee "whole" by restoring to the employee all the service credit, sick and annual leave and step increases or career ladder promotions he would have received had he not been unlawfully fired.