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LAW FIRM NEWS

September 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.

NSPS: Now What?

On August 10, 2007, the D.C. Circuit denied the Unions' petition for an *en banc* rehearing by all the judges on the Court of the decision of the May 22, 2007, 3-judge panel decision that upheld DOD's NSPS regulations. As of now, the labor relations and appeals parts of the 2005 regulations are completely valid. It is likely that a petition will be filed asking the Supreme Court to hear the case. In the meantime, the silence from DOD continues to be deafening. There is no "National Security Labor Relations Board." We've yet to hear of a single DOD installation invoking the NSPS regulations in support of any position taken by the installation in collective bargaining or in the processing of a grievance or employee appeal. Our opinion is that the next move is up to Congress: repeal the law allowing DOD to create its own personnel system independent of all the civil service laws, or wait for the administration that takes office in January 2009 to publish a completely new set of NSPS regulations? (Anybody in favor of union shop?)

Union Data Requests Can Include Requests for "Information"

We came across an old FLRA case recently which, surprisingly, hasn't been overruled. Federal agencies often

argue that a union's right to request and obtain "data" under 5 USC 7114(b)(4) covers only tangible items like documents, photographs or audio tapes. However, in *VA Regional Office, Buffalo, New York,* 28 FLRA 260 (1987), the Union's data request not only sought documents but also answers to specific questions. The Union filed a grievance on behalf of an employee who was reassigned to another job because she had a realtor's license (which created some sort of conflict of interest with her job duties). The Union asked management for her realtor's license, her position description and the name of the realtor who reported that she had a realtor's license and the reason or authority for her reassignment. The FLRA ruled that "all of the information was necessary" and, at page 267 of its decision, ordered the Agency to provide the Union with copies of the information that was reasonably available and to properly respond to the Union's requests for the information.

Pay Cases

● On July 30, 2007, the Federal Circuit dismissed a class action lawsuit filed by correctional officers with DOJ's Bureau of Prisons seeking hazard pay for daily exposure to secondhand cigarette smoke in the inmate areas. The Court ruled that exposure to cigarette smoke does not fall within one of the categories for hazard pay in OPM's regulations. According to the Court, such exposure is not an "unusual" hazard in the work environment, and cigarette smoke is not a "toxic chemical" within the meaning of the hazard pay regulations. *Adair, et al. v. United States,* No. 2006-5077 (Fed. Cir. 2007).

● A Bureau of Prisons employee fared better in *Bishop v. United States,* No. 03-446C, issued by the Court of Federal Claims on July 11, 2007. He filed claims for overtime pay under title 5 of the U.S. Code (not under the FLSA). Those claims became extremely difficult after the Federal Circuit's decision in *Doe v. United States,* 372 F.3d 1347 (Fed. Cir. 2004), holding that overtime pay under title 5 must be "officially ordered or approved" *in writing.* The court ruled that time spent working while traveling (the employee was escorting an inmate) qualified for overtime pay because the travel orders themselves satisfied the "officially ordered or approved in writing" requirement. The court, though, rejected another claim by the employee for time spent preparing to make presentations at meetings regularly scheduled to start at the beginning of the day. The court agreed with the employee that he could not possibly be expected to be ready for these types of meetings without working after hours but, pointing to the *Doe* decision, said the lack of a written order requiring him to work overtime doomed his claim for overtime pay.

● The next pay case is a private sector case, but it involves the FLSA, which applies to federal employees the same way it applies in the private sector. In *Bonilla v. Baker Concrete Construction,* 12 WH Cases2d 100 (11th Cir. 2007), the Court addressed a common dispute over whether time going to and from the work site, once on the employer's facility, is paid time. Under the "Portal to Portal Act of 1947" this is generally not considered to be "hours of work," *unless* the employee is doing something for the employer during this time, like putting on or taking

off protective clothing or delivering or picking up rosters or reports. The *Bonilla* case involved employees repairing an airport runway who claimed they should be paid for the time spent clearing through airport security and riding buses to and from the work site. The Court decided this time is not "hours of work" under the "Portal to Portal Act" and so the employer was not required to pay overtime.

The First Amendment: post-"Garcetti"

These are weird times for the First Amendment, after the Supreme Court's 5-4 decision last year in *Garcetti v. Ceballos,* which ruled that any kind of statement made by a public employee *in the regular course of performing his job* is not entitled to First Amendment protection. The decision in *Morales v. Jones,* 45 GERR 947 (7th Cir. 2007), involved a police officer who claimed he was transferred to the night shift after reporting illegal conduct by a top department official in a report to the district attorney's office and also in response to questions he was asked in a deposition taken in a lawsuit filed by a another police officer against the department. A jury ruled in favor of Officer Morales but the Seventh Circuit ruled the case must be sent back for another trial because one of those activities was protected by the First Amendment and one wasn't. Guess which? The Court said "being deposed in a civil suit pursuant to a subpoena was unquestionably not one of Morales' job duties because it was not part of what he was employed to do." However, the Court said that filing the report with the district attorney *was* part of his job and so was unprotected by the First Amendment. One of the 3 judges dissented, arguing that the report to the district attorney was *not* part of Officer Morales' regular job duties. Under *Garcetti*, it would not be difficult to imagine another 3-judge panel deciding that both these activities were part of Officer Morales' job and so he had <u>no</u> First Amendment protection. When a public employee has to think about how a 3-judge appeal court panel is going to rule before exercising his First Amendment rights, he's probably not going to exercise them at all. (Which was, no doubt, the point of the 5 Supremes in the *Garcetti* decision).

EEO Cases

● Here's a case about a ruling on evidence that doesn't come up much, but it could be interesting to the health care professionals represented by a number of our union clients. The case involved a lawsuit filed by a staff physician at a hospital alleging race discrimination. During the "discovery" part of the lawsuit, the physician sought certain documents commenting on his conduct and performance. The hospital responded that these documents were exempt from disclosure under the "peer review privilege" since they included comments by his fellow physicians. The Court ruled that, even though the "peer review privilege" applies in other cases, it cannot be invoked in a job discrimination case to shield the employer from revealing what may be evidence of discrimination. *Adkins v. Christie,* 100 FEP Cases 1262 (11th Cir. 2007).

● Employers defending against claims under the Equal Pay Act (EPA), which prohibits the payment of different wages or salaries to employees of different genders who are doing essentially the same work, almost

always argue that the difference in pay is due to “a factor other than sex”—one of the few defenses available under the EPA. In *Brown v. Fred’s Inc.,* 101 FEP Cases 113 (8th Cir. 2007), the Court rejected the employer’s claim that a male assistant manager’s salary was higher than a female assistant manager’s salary at the same store because he used to work at a higher-volume store and simply kept his old salary when he transferred to the smaller store. The Court found no evidence that the difference in sales volume made any real difference in the working conditions at the two stores and upheld a jury verdict in favor of the female assistant manager.

● It is unusual, and reassuring, when a court insists on some real evidence from an employer at “step 2” of the famous *“McDonnell-Douglas* analysis” in an EEO case. At step 1, the employee must establish a *prima facie* case with evidence that raises some suggestion or inference that discrimination might have occurred. At step 2, the employer must present evidence that it had some specific non-discriminatory reason for the decision the employee is challenging, though the employer does not have prove that it acted for this reason. At step 3, the employee may succeed in proving discrimination indirectly if she can convince a judge or a jury that the reason put forth by the employer at step 2 makes no sense at all. Too often, courts gloss over step 2, saying that an employer that offers any reason other than discrimination for what it did has met its burden of producing evidence at that step. In *Alvarado v. Texas Rangers,* 100 FEP Cases 1793 (5th Cir. 2007), however, the Court ruled that the employee automatically won her case because the employer’s step 2 explanation for not promoting her didn’t even count as an explanation. The employer simply said she scored 29th in the selection process and only the top 10 scorers were promoted. The Court said this might be an acceptable explanation if the scores were based on objective or measurable criteria, but in this case the scoring was completely subjective. Since the top 10 scorers were all males and the employer offered no reason <u>why</u> they scored high and the plaintiff scored low, the Court ruled in her favor.

Comic Relief

the Court came through on August 30, 2007, with *Robinson v. Dept of Homeland Security,* No. 2006-2123. What should have been a routine “After the Supremes’ 1988 decision in *Navy v. Egan,* you can’t do anything about a demotion or a removal based on loss of a security clearance” became a 3-ring circus- not easy when only 3 judges are on the panel that issues the decision. The decision of “the Court” upheld the MSPB’s ruling against the employee but before explaining its reasons, declared “we explain these reasons in some detail in hopes that the MSPB and litigants before the MSPB will better understand the applicable law.” The Court’s decision was followed by a concurring opinion from one of the 3 judges, who said the Court’s decision was very misleading because the employee could not possibly think he could raise the arguments he tried to raise. That opinion was followed by another concurring opinion from another one of the 3 judges, who said the Court’s decision gave short shrift to the employee’s arguments and that they were legitimate arguments that deserved to be addressed more clearly and in more detail.