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LAW FIRM NEWS

September 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 a 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.

Big Income Tax News

We sent a special memo to our clients on August 22, 2006, concerning the D.C. Circuit's decision that day in *Murphy v. Internal Revenue Service*. For those who did not see the memo, the court ruled that a law passed by Congress in the early 1990's providing for compensatory damages to be taxed as "income" is unconstitutional. The 16th Amendment to the U.S. Constitution provides for the taxation of "income." The court ruled that compensatory damages for emotional distress is not "income" because it is not any kind of "gain" or "profit." Instead, said the court, money damages for this type of injury have always been considered to be a form of making a person "whole" in dollar terms for the pain, suffering or distress they endured. Obviously, this has significant implications for the payment of compensatory damages for emotional distress in EEO cases (the *Murphy* case itself involved an award of compensatory damages for emotional distress to a state employee for "whistleblower reprisal"). Whether the court's decision will be reconsidsered or appealed is unknown at this time, but employees who have received or may soon receive payments for compensatory damages on an employment claim should consult with a qualified tax advisor.

Why is this an "Unpublished" Decision?

On July 17, 2006, the D.C. Circuit issued a decision that wasn't even signed by one of the judges on the panel who decided it, but which may have a significant impact on the scope of "appropriate arrangements" bargaining under 5 USC 7106(b)(3): *National*

Weather Service Employees Organization v. FLRA, No. 05-1397. Its so darn interesting, we've attached it to this newsletter. Due the increased workload caused by conversion to a new computer system, the union proposed that the agency increase staffing to help deal with this. The FLRA summarily branded the proposal as "non-negotiable" since it would interfere with management's decisions on the numbers and types of employees at that location; decisions which, as President Bush reminded everyone immediately after he was "elected," federal agencies are not required to negotiate with unions. The court faulted FLRA for declaring the proposal non-negotiable simply because it interfered with a management right without evaluating whether it "excessively" interfered with that right or was an "appropriate arrangement" for employees adversely affected by the exercise of the right.

"I'm the Dissenter!"

Just as the man who appointed him to be the Chairman of the MSPB is "the Decider," MSPB Chairman Neil McPhie can rightfully claim to be "the Dissenter." The more often he dissents, the more reason there is to hope that the merit-based civil service system will survive. In *Carlton v. Dept of Justice* (August 3, 2006), the 2 other MSPB members upheld the initial decision of an administrative judge (AJ) who found that the agency's charge that the employee threatened to kill his wife was not true, based mainly on the in-person testimony of the employee and his wife. Chairman McPhie dissented, saying that a garbled recording of a 911 tape on which the employee and his wife could be heard arguing was more than enough evidence to sustain the agency's decision to fire the employee. In *Dussault v. OPM* (August 11, 2006), the MSPB ruled that OPM should have granted the employee's disability retirement application since her employer itself removed her from employment for physical inability to perform her job. Chairman McPhie dissented, saying that, regardless of the reason she was fired, her medical evidence was not strong enough to convince him that she was incapable of performing her job. In another disability retirement appeal, the MSPB returned the case to the MSPB regional office for consideration of medical evidence the Regional Office had not considered. *Lynum v. OPM* (August 15, 2006). Chairman McPhie dissented on the basis that the employee, who did not have an attorney or other representative, had already blown her opportunity to present medical evidence before the MSPB regional office issued its initial decision. In *Hardison v. Dept of Navy* (August 11, 2006), the MSPB upheld the initial decision of an administrative judge (AJ) who reduced the employee's removal from employment to a demotion after finding most of the agency's charges against the employee unsupported by the evidence. Chairman McPhie said that as long as some part of the case against the employee remained, she deserved to be fired. In *Jackson-Francis v. Office of Government Ethics* (August 16, 2006), the MSPB granted an employee's appeal from an initial decision by an MSPB AJ that upheld the agency's decision to remove her for unacceptable work performance. The MSPB concluded that the employee could not be fired for failing to reach the "fully successful" level under her performance plan, since the performance plan itself allowed a lower level of performance ('minimally successful") and the agency never determined whether her performance rose to that level. Chairman McPhie dissented, this time for no reason at all! The decision states "Chairman McPhie dissents without opinion." What could have clouded the judgment and hardened the heart of any man to these extremes? Whatever it was, it's impossible to understand how someone with this attitude could be appointed to head an agency called the "Merit Systems Protection Board."

ADA Cases

- It would be interesting to see if the rationale for a recent state court decision could be applied to federal sector employment. In *Jackson v. Water Pollution Control Auth. Of Bridgeport,* 44 GERR 788 (Conn. 2006), the Connecticut Supreme Court upheld a jury verdict in favor of a city employee who was indefinitely suspended pending a medical assessment of his fitness for duty. The court found there was sufficient evidence from which the jury could have concluded that the employee was indefinitely suspended because of his disability, since he was not warned ahead of time that he was performing his duties inadequately and since the city, after suspending him, made no effort at all to arrange a medical exam for him.

- An MSPB decision from a few years ago is worth reviewing again: *L'Bert v. Dept of Veterans Affairs,* 88 MSPR 513 (2001). The employee was charged with insubordination for refusing to submit to a psychological evaluation, and with mistakes in work performance that endangered patients. Although the MSPB upheld the agency's decision to fire the employee based on the seriousness of the second charge alone, it ruled that the first charge was invalid. In essence, the MSPB found that the agency ordered the employee to submit to a psychological evaluation solely because the employee told the agency she had a physical condition (asthma) and she needed some sort of accommodation for it.

Title VII Cases

- In *Jordan v. Cleveland, Ohio,* 98 FEP Cases 682 (6th Cir. 2006), the court upheld a lower court ruling that awarded $175,000 for emotional distress to a city firefighter for racial harassment. The court rejected the city's argument that the firefighter had not been subjected to any "significant" personnel action, saying that unfair work assignments and the refusal to assign him to shifts where he would earn premium pay were enough to support the decision in his favor.

- What does it mean to be subjected to discrimination because of your gender? In *Vickers v. Fairfield Medical Center,* 98 FEP Cases 673 (6th Cir. 2006), the court ruled that a hospital worker who was taunted and harassed because co-workers thought he was "gay" was not subjected to sex discrimination. The court said that discrimination against an employee because he does not conform to traditional gender stereotypes of how a man ought to act could be sex discrimination, but it wasn't sex discrimination in this case because the employee didn't act "gay" at work but only when he was away from work! To quote a famous person, "We're not making this up." Up next: a case where this court rules that an employee cannot sue his employer for taunting and harassment inflicted on him at work due to his race because he didn't "act like a Negro" when he was at work but only off-duty.

Duty of Fair Representation

The NLRB's decision in *Letter Carriers Branch 1227,* 179 LRRM 1261 (2006), involved a complaint by a number of postal employees that the union breached its duty of fair representation by the way it distributed the proceeds from a group grievance. The union decided to distribute lower shares of the settlement to employees who had retired than to

employees who were still working. The NLRB noted that the union sought legal advice before doing this, and that the union's legal obligation to retirees was uncertain, so the union acted in good faith by making what it considered to be a fair compromise.

"Civil Service Evidence"

Can't get through an entire newsletter without taking a swipe at the stacked deck known as the "Federal Circuit." Even Congress has had second thoughts about its decision in the early 1980's to give this court exclusive jurisdiction over appeals from all MSPB decisions (a bill is now pending in Congress that would at least allow for MSPB decisions on whistleblower reprisal cases to be filed in the federal appeals court for the region where the employee lives). There is rarely any quantum of "evidence" the Federal Circuit will find insufficient to sustain a federal agency's decision to fire an employee. *Stevenson v. Dept of Justice,* No. 06-3090 (August 29, 2006), involved a correctional officer who was fired for failure to report that he was arrested off-duty, as required by agency policy. The employee testified that he made an oral report directly to the Warden and the Associate Warden, and that the Warden told him he did not have to file a written report yet and to "keep him posted." The agency responded to this by introducing an affidavit from the Warden which said that *to the best of his recollection,* the employee did not report the arrest to him. "Good enough for the MSPB; good enough for us" said the Federal Circuit. You'd never know that it was the agency that had the "burden of proof."

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-1397 **September Term, 2005**

FILED ON: JULY 17, 2006 [980399]

NATIONAL WEATHER SERVICE EMPLOYEES ORGANIZATION,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY,
RESPONDENT

On Petition for Review of an Order of the Federal Labor Relations Authority

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Before: HENDERSON, ROGERS and GRIFFITH, *Circuit Judges*.

J U D G M E N T

This cause was considered on a petition for review of an order of the Federal Labor Relations Authority ("FLRA" or the "Authority") and was briefed and argued by the parties. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. Rule 36(b). It is

ORDERED AND ADJUDGED that the petition for review is granted and the case is remanded to the Authority for further proceedings.

To help employees dealing with the increased workload caused by the National Weather Service's decision to switch to a new computerized weather forecasting system, the National Weather Service Employees Organization (the "Union") proposed that the National Weather Service ("NWS") increase staffing at its Anchorage Weather Forecast Office ("WFO"). After the NWS refused to negotiate over the proposal, the Union petitioned the Authority for review. The Authority dismissed the petition for review, holding that the proposal was not an "appropriate arrangement," and, consequently, not negotiable. *See* 5 U.S.C. § 7106(b)(3) (requiring that management bargain with union officials over "*appropriate arrangements* for employees adversely affected by" management's exercise of its

authority to determine the organization and number of employees) (emphasis added). The Authority reached this decision after concluding that the Union's proposal would interfere with management rights by "leaving the Agency with no discretion as to the numbers and types of staff to assign to the Anchorage WFO." *Nat'l Weather Serv. Employees Org. v. U.S. Dep't of Commerce*, 61 F.L.R.A. No. 46, 243 (2005). Because the Authority concluded that this burden on management "outweighs any benefit [the proposal would have had for] employees," it held that the proposal was not an "appropriate arrangement." *Id*. The Authority did not, however, consider whether the proposal would have hampered the ability of the agency to get its job done in an effective and efficient manner. The Union now petitions this Court for review, arguing, among other things, that the Authority erred by failing to consider this factor.

We agree with the Union. In *American Federation of Government Employees, Local 1923 v. FLRA*, we explained that the determination whether a proposal is an appropriate arrangement "depends primarily on the extent to which the interference [with management rights] hampers the ability of an agency to perform its core functions—to get its work done in an efficient and effective way." 819 F.2d 306, 308-09 (D.C. Cir. 1987). Thus, assuming the proposal is an "arrangement"—which neither side disputes is the case here—"if implementation of [the] proposal will directly interfere with substantive managerial rights, *but will not significantly hamper the ability of an agency to get its job done*, the proposal . . . is negotiable . . . as an appropriate arrangement." *Id*. at 309 (emphasis added). Put another way, the "question . . . whether [a] proposed arrangement is appropriate within the meaning of § 7106(b)" "*demands* that we examine the extent to which implementation of the proposed arrangement would hamper the ability of the agency to perform its work in an efficient and effective manner." *Id*. at 310 (emphasis added). The Authority did not make this examination here. We must therefore grant the petition for review and remand to the Authority so that it can consider to what extent "implementation of the [Union's proposal] would hamper the ability of the [NWS] to perform its work in an efficient and effective manner." *See id*.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing *en banc*. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk