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LAW FIRM NEWS

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Our Regular Reminder

This is a reminder to all our union clients of the various services available from our law 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 any 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.

Gone

Turns out the best thing to come out of FLRA this year was the General Counsel herself. On February 22, 2008, Colleen Duffy Kiko announced her resignation as FLRA General Counsel. This could not have happened to a nicer person- and we mean that.

"Standing" to Challenge Contracting-Out

The hits keep coming from Public Law 110-181, the new law discussed in last month's newsletter. Not only did this law do to the NSPS law what the administration has been trying to do to federal employees, not only did it assure Wage Grade employees of compensatory time for travel, just like General Schedule employees, but it also conferred "standing" on federal employees to challenge contracting-out decisions under OMB Circular A-76. This was a gap in the law for decades. Section 326 of Public Law 110-181 provides that an "interested party" who may appeal a contracting-out decision now includes any employee who has been designated as the agent of the affected federal employees.

Federal Circuit: Good Ones

- One of the worst MSPB

decisions of 2006 (and that's saying a lot) was *Chambers v. Dept of Interior,* reported in our October 2006 newsletter. Ms. Chambers 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 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. On February 14, 2008, the Federal Circuit disagreed, discovering that the law protects an employee from reprisal for making a disclosure of information she reasonably believes shows "a substantial and specific danger to public health or safety." The law has contained this language since it was enacted in 1978.

- In *Baird v. Dept of Army,* No. 2007-3046 (February 26, 2008), the Federal Circuit breathed some life back into the rules for prehearing discovery. Ms. Baird was fired for testing positive on a random drug test. In her MSPB appeal, she tried to obtain e-mail correspondence between the installation commander and the deciding official- evidence that she believed would show that the commander gave the proposing and deciding officials no choice and mandated her removal from employment rather than some lesser penalty, based on the commander's "zero-tolerance" policy. The Court ruled it was a mistake for the MSPB not to compel the agency to turn over this information and remanded the case for further proceedings.

- *Texeira v. U.S. Postal Service,* No. 2007-3171 (February 28, 2008), involved a Postal supervisor who was demoted because of errors and irregularities in accounting for and reporting her employees' time. The MSPB upheld the charge of "failure to follow proper timekeeping procedures" but found she was not guilty of deliberately submitting false time reports. The difference wasn't important for the agency, or for the MSPB, which sustained the original decision to demote her. The Court reversed and sent the case back with instructions to impose a lesser penalty. The Court explained that when a far more serious charge is set aside, leaving only a less serious charge sustained, it makes no sense to conclude that the agency would have taken the same action anyway.

MSPB: Good One

- *Do The "Douglas Factors" Still Exist?*

On February 20, 2008, the MSPB issued a decision *disagreeing* with a decision of one of its administrative judges to uphold the removal of a Postal letter carrier from federal employment. *Tryon v. U.S. Postal Service,* 2008 MSPB 35 (2008). The Postal Service could not prove some of its charges against Mr. Tryon but argued he should be fired anyway. MSPB HQ disagreed and mitigated the

penalty to reinstatement with a 60-day suspension. What was the offense for which Mr. Tryon- an employee with 45 years of service and no prior discipline- lost his job? He hugged a customer (and he admitted it too). Perhaps the most shocking aspect of this ruling is that Chairman McPhie did not issue a dissenting opinion. It's too early to tell if the MSPB is beginning to remember what its initials stand for, but it's a good sign.

EEO: Bad Ones

Decisions like these are hard to figure out. They conflict with common sense and even with other case decisions. The only consolation is that they are usually ignored in future case decisions.

- The Tenth Circuit ruled in *Lindstrom v. United States,* No. 06-8059 (December 14, 2007), that a federal employee may not file a lawsuit in court to enforce a settlement agreement in an EEO case. What?! According to the Court, the sole remedy available to a federal employee for breach of a settlement agreement is to file a petition for enforcement under the EEOC's federal sector regulations.

- You could see this one coming: In *Solomon v. Pioneer Adult Rehab. Ctr.,* D. Utah, December 21, 2007, a federal judge ruled that a custodian who was hired under a program for the disabled could not claim discrimination on the basis of disability under the ADA when she was fired. Like so many before her, the plaintiff wasn't "truly disabled." She only has a heart condition and a traumatic brain injury.

- The Fifth Circuit dismissed a lawsuit alleging sexual harassment in *Lauderdale v. Texas Dept of Criminal Justice,* 102 FEP Cases 555 (5th Cir. 2007). The plaintiff complained to her supervisor that she was being sexually harassed by the acting warden. The supervisor refused to do anything about it. She eventually filed a lawsuit but the Court threw it out because it was unreasonable for her not to report the harassment to somebody else.

No "Reasonable Suspicion"

An airline's decision to fire a flight attendant for being under the influence of alcohol on duty was reversed in *Southwest Airlines Co.,* 124 LA 813 (Allen, 2008). Two flight attendants noticed another one "acting peculiarly" and he was carrying a cup of what appeared to be alcohol. Instead of promptly confronting the other attendant or anyone else, they reported their suspicions later to management, they wrote and submitted statements about what they'd observed, and the other flight attendant was fired. Arbitrator Dale Allen, Jr., sustained the grievance and reinstated the flight attendant, finding that he showed no signs of being drunk and that no one asked him to take an alcohol test.

Sign Up Now! Share Your Biometric Data with the Government

The "CLEAR" card: Is it a right-wing conspiracy? A left-wing conspiracy? You may have seen the brochures in some airports urging passengers to sign up for the "CLEAR" card. Once you're registered and get your card, you can stand in a shorter line at airport screening but you and

your stuff still have to go through all the machines, take off your clothes, and get x-rayed, scanned, puffed, beeped at and everything else. If you travel a lot, you probably qualify for some airline's "status" card and can get in a shorter line anyway. What does TSA want from you in return for the "CLEAR" card (besides $128)? They want copies of government-issued photo identifications: "The full list of acceptable documents can be found at flyclear.com." They also want to verify your iris or fingerprint: "Our kiosk will verify your identity using your Clear Card and your biometric data." If anyone reading this works for TSA and can explain why this isn't the first step toward turning us all into *soylent green*, please contact us (but don't use our irises or fingerprints!)