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GOVERNMENT EMPLOYEE RELATIONS

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Lead Report

Competitive Sourcing

Contracting Out

Sen. Kennedy Offers Amendment to Curb DOD Competitive Sourcing, Promote Fed Workers

Sen. Edward Kennedy (D-Mass.) June 2 offered an amendment to the fiscal year 2005 defense authorization bill (S. 2400) that would curb the Defense Department's competitive sourcing initiative by all but eliminating use of the streamlined process contemplated under the revised Office of Management and Budget Circular A-76.

The Kennedy amendment would:

- require a public-private competition under the revised circular before outsourcing for any DOD function performed by 10 or more civilian employees, including a most efficient organization plan;
- require the private sector to beat the government's bid by 10 percent, or $10 million, whichever is less;
- prevent contractors from scaling back or not offering health benefits to become more cost-competitive, so that comparative savings resulting from ''inferior'' health benefits would not count toward the cost difference of the bids; and
- prohibit DOD from modifying, reworking, updating, or otherwise changing a function so that it is technically performed by fewer than 10 workers so as to meet streamlined conversion rules.

The Kennedy amendment (No. 3257) was cosponsored by Sen. Saxby Chambliss (R-Ga.).

The Senate is expected to continue consideration of its defense authorization bill into the week of June 7.

Differences Could Skirt Veto Threat. In a move that could avert a presidential veto, the Kennedy amendment parallels successfully added legislation authored by Rep. Jim Langevin (D-R.I.) for the House version of the defense authorization bill (H.R. 4200) except for two key provisions. The House passed its version May 20.

Unlike Langevin's provisions, Kennedy's amendment would not require DOD to ''in-source'' jobs. While Langevin's amendment would establish a pilot program to run in FY 2005 and FY 2006 that would subject DOD contractor employees to public-private competitions equal to roughly one-tenth of the civilian employees subjected to competitions, as well as equal to one-tenth the value of DOD's spending on new work, Kennedy's amendment does not.

The Bush administration, in a statement of administration policy (SAP) issued by OMB, May 19 declared its opposition to any final defense measure that limits DOD's competitive sourcing flexibility (42 GERR 492, 5/25/04).

''Arbitrary quotas concerning commercial work to be performed by federal employees would undermine the department's ability to redirect its manpower to military activities, likely require the redeployment of uniformed personnel from critical in-theatre operations to non-core support activities, increase operating costs, and sacrifice billions of dollars in potential cost savings,'' the SAP said.

The White House threatened to veto the bill if it contained a provision similar to Langevin's language that would require DOD employees to compete for a certain percentage of work now performed by private contractors. Kennedy's amendment does not include that provision.

Kennedy's amendment also does not include a nonbinding ''sense of Congress'' statement, as Langevin's does, stating that both DOD civilian and contractor employees should enjoy ''comparable treatment'' throughout the competition, including access to relevant data and legal standing before the General Accounting Office and the U.S. Court of Federal Claims, as Langevin's language did in the House.

Instead, Kennedy's amendment would require the defense secretary to ''prescribe and enforce guidelines'' for ensuring that federal employees can compete under Circular A-76 ''on a regular basis for work that is performed under Department of Defense contracts and could be performed by federal government employees.'' Furthermore, the secretary's guidelines would give ''special consideration'' to contracts that:

- have been performed by federal employees at any time on or after Oct. 1, 1980;
- are associated with the performance of inherently governmental functions;
- were not awarded on a competitive basis; or
- have been determined by a contracting officer to be poorly performed due to excessive costs or inferior quality.

Several trade associations in May declared their opposition to Langevin's amendment in the House. Alan Chvotkin, senior vice president and counsel at the Professional Services Council, told BNA June 3 that PSC would actively oppose the Kennedy amendment.

On the other hand, federal employee unions have endorsed the efforts to limit DOD's competitive sourcing work.

Contracting Out

OMB Releases Third Set of FAIR Act Lists; 130,000 FTEs Are Outsourcing Candidates

Roughly 130,000 full-time equivalents in 36 federal departments and agencies could be subject to public-private job competitions, according to the third set of federal agency commercial activities inventories for fiscal year 2003, which was released by the Office of Management and Budget May 27 (69 Fed. Reg. 30341, 5/27/04).

Out of a combined total of 565,791 FTEs in the 36 agencies, 291,126 FTEs, or 51.5 percent, were listed as being ''commercial'' in nature—and thus possibly subject to outsourcing competitions—and another 274,664 FTEs, or 48.5 percent, were listed as being ''inherently governmental.''

Of the 291,126 FTE activities listed as commercial, 161,278, or 55.4 percent, fall into one or more categories exempt from public-private competition under OMB Circular A-76. That leaves 129,848 commercial FTEs, or 44.6 percent, as potential candidates for competitive sourcing under the circular.

The departments of Agriculture, Commerce, Education, Justice, Treasury (excluding the Internal Revenue Service), and Veterans Affairs were among the agencies included in the third release of FY 2003 inventories.

DOD, Other Agencies Included in First Two Lists. The Defense Department, which leads the federal government in competitive sourcing studies to date, was included in the second FAIR Act release, which was announced Jan. 23 (42 GERR 76, 1/27/04). DOD listed 420,961 positions engaged in commercial activities, of which 207,652 FTE positions were not exempt from competition (42 GERR 76, 1/27/04).

The first set of FY 2003 inventories covered 37 agencies, including the Housing and Urban Development Department, Interior Department, Transportation Department, the National Aeronautics and Space Administration, OMB, and various boards and commissions, was released Nov. 21, 2003 (41 GERR 1163, 11/25/03).

The annual inventories, required under the Federal Activities Inventory Reform Act of 1998 (Pub. L. No. 105-270), list both activities that are not inherently governmental, which are thus potential candidates for contracting out, and those that are inherently governmental, and thus not appropriate for private sector performance.

The Web sites for the inventories included in the third release are identified in the OMB Federal Register announcement. The Federal Register is available online at http://www.gpoaccess.gov/fr/index.html.

Contracting Out

Forest Service Officials Tell Congress They Felt Pressure to Meet A-76 Goals

Forest Service officials responsible for carrying out the Bush administration's competitive sourcing initiative at the agency told congressional investigators that they felt pressure to meet contracting-out goals, so they picked ''easy'' public-private competitions—though not the most fruitful—to study, according to a March report for the House Appropriations Committee.

For fiscal years 2002 and 2003 combined, the Forest Service estimated spending approximately $23.6 million on competitive sourcing studies. But the agency plans to report to Congress annual savings of just $5 million from those competitions.

The Forest Service initiated 171 studies in the two fiscal years combined, involving 3,694 full-time equivalent (FTE) positions, and has completed 169 studies as of February 2004. The agency won 161, or 95 percent, of the competitions.

Historically, the federal government has won about half of such competitions, according to Office of Management and Budget data.

The Forest Service May 27 was in the midst of forming a formal response to the committee report but would not comment immediately, an agency spokeswoman said.

The congressional report, prepared by the committee's surveys and investigations staff, came in response to a Sept. 5, 2003, committee directive for an investigation of the Forest Service's competitive sourcing performance.

'Nobody Could Beat Us,' Official Said. A congressional analysis of the 169 completed studies revealed several key factors that contributed to the ''unusually'' high percentage of Forest Service ''wins,'' including:

(1) Forest Service decisions to conduct maintenance studies of small numbers of FTEs; and

(2) Forest Service and OMB methodologies for calculating estimated agency and private sector costs.

More than 46 percent of the 169 completed studies, or 78 studies, involved 3 FTEs or fewer, 36 of which involved only a fraction of an FTE. Forest Service officials acknowledged to congressional investigators that studying such small numbers contributed to ''unrealistic'' competitions and made it unlikely that private sector providers would submit bids.

According to the committee report, a senior Forest Service official did not believe there was any malice or forethought in conducting such small studies but noted, ''by slicing and bundling the way we did, nobody could beat us.''

The Forest Service expects a loss of no more than 75 FTEs resulting from the 169 studies. To date, 16 FTEs have been eliminated in maintenance activities.

Furthermore, congressional investigators said, the bulk of the reported savings, $4.6 million, is derived from contracting with a single, unidentified contractor to provide the End User Support Center help desk services, a single point of contact for computer and software-related problems. Contracting out the help-desk function, however, did not result in the elimination of any FTEs as employees performing help-desk functions continue to perform other IT duties.

Private Sector Complaint. The acknowledgment mirrors charges by trade associations that have complained that since OMB revised its Circular A-76 a year ago, many public-private competitions across the government have not been conducted in the expressed spirit of the administration's initiative.

''The officials reported feeling under pressure to meet agency FTE targets and, therefore, selected activities

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they believed would allow the Forest Service to meet goals, be easy to study, and generate studies that could be completed within the year,'' congressional investigators reported.

They did not note who ostensibly applied pressure on the Forest Officials officials.

But the report also highlighted details related to a May 25 OMB report on competitive sourcing where the Agriculture Department's performance raised the ire of OMB officials (42 GERR 517, 6/1/04).

The OMB report found that USDA lost a net of $3.6 million for completed competitions during FY 2003 and the first quarter of FY 2004, or $5,000 per FTE in standard studies and $1,000 in streamlined studies. The Interior Department, uniquely, could not or did not provide sufficient data to calculate for comparison per FTE, although it claimed to save a total of $3.2 million.

An OMB official told BNA May 21 that OMB Deputy Director for Management Clay Johnson ''hit the roof'' when he saw the Agriculture and Interior results. Secretary-level discussions over those departments' competitive sourcing efforts are expected, the official said.

''The deck is being stacked against private companies,'' said Chris Jahn, president of Contract Services Association of America, in response to the May 25 OMB report. ''At some point, if these competitions continue to be drastically one-sided, the private sector will stop playing. The taxpayer will be the loser in the long run,'' he said.

The House Appropriations Committee report is available at http://appropriations.house.gov/_files/ForestServiceCompSourcingReport.pdf.

Contracting Out

DOD Submits Plan for Using Revised Circular, Outlines Role of Competitive Sourcing Official

The Defense Department has assured Congress that it is endeavoring to improve the data it collects on the costs and quality of work contracted out and retained in-house as a result of the competitive sourcing process conducted under the revised version of Office of Management and Budget Circular A-76.

In a report submitted to Congress in February but not publicly released, DOD admitted that it is difficult to assess quality. ''As a practical matter, quality is not easily quantifiable,'' DOD said. ''Currently, we cannot gauge quality from the quantitative data that we use to track hundreds of commercial activities in the [Commercial Activities Management Information System] data base.''

However, DOD said it has periodically reviewed quality of performance based on a sample of public-private competitions. It cited a February 2001 report by the Alexandria, Va.-based Center for Naval Analysis, a nonprofit consulting firm, which said that the quality of performance improved or remained the same as a result of such competitions.

Section 335 of the fiscal year 2004 defense authorization act (Pub. L. No. 108-136), allows DOD to delay implementation of the revised Circular A-76 issued May 29, 2003, until 45 days after it provides a report to Congress on ''the effects of the revisions.'' The report DOD sent to Congress in February was sent in response to this requirement.

Although no one contacted by BNA was able to pinpoint the date on which the report was sent, all agreed that the required 45 days have passed, and that DOD is now preparing to conduct public-private competitions under the terms of the revised circular.

Duties of CSOs, CCSOs. Separately, Deputy Under Secretary of Defense for Installations and Environment Raymond DuBois, in a March 29 internal memorandum, outlined the responsibilities of DOD competitive sourcing officials (CSOs) and Component CSOs (CCSOs). Circular A-76 requires each agency to have a CSO to be responsible for implementing the agency's competitive sourcing efforts.

''Clear, transparent, and consistently applied policies and procedures are the essential elements of successful public-private competitions,'' DuBois said in his internal memo, a copy of which was obtained by BNA. ''CCSOs must ensure that their Components conduct fair and efficient public-private competitions without bias for any preferred outcome or preferential treatment of any source (private sector, government personnel, or other agencies).''

On Sept. 12, 2003, Defense Secretary Donald Rumsfeld appointed DuBois as DOD's CSO. DuBois in turn designated CSOs for each of the military departments and defense agencies.

The CSOs' roles are spelled out in Circular A-76. For example, the CSO is responsible for the appointment of competition officials; submitting requests to OMB to deviate from the circular; approving the cancellation of any A-76 competition once a competition has been publicly announced; approving time limit waivers and competition time extensions; approving the use of the trade-off process if it is not already allowable under the circular; and communicating with OMB.

News

Discrimination

EEOC Implements Hearings Assessment Plan For Washington Office; AFGE Plans Challenge

The Equal Employment Opportunity Commission's Washington Field Office (WFO), which has jurisdiction over the District of Columbia and Northern Virginia, effective June 1 began implementation of a proposal to provide ''assessments'' to administrative judges on the status of cases filed in that office's hearings unit.

The aim of the new WFO Hearings Case Assessment Program, according to a May 27 memorandum to the hearings staff from WFO Acting Director Dana R. Hutter, ''is to give WFO Administrative Judges . . . additional tools for efficient and high quality processing of federal sector cases, thus providing better service to both Complainants and Agencies.''

But the WFO initiative likely will be facing a challenge from the American Federation of Government Employees, which is asserting that the plan improperly limits the authority of EEOC administrative judges represented by the union.

Andrea Brooks, director of the Women's and Fair Practices departments at AFGE, told BNA June 3 that the union is currently collecting evidence and hopes during the week of June 7 to file an unfair labor practice complaint against the EEOC with the Federal Labor Relations Authority. In the complaint, the union will assert that the WFO has implemented a substantive work change without bargaining with its employee union, AFGE Local 3614, she said.

AFGE also believes that the change adversely affects federal employees in general because it will abridge federal workers' EEOC hearing rights, Brooks said.

'Red,' 'Yellow,' and 'Green' Cases. The May 27 memo from Hutter stated that effective June 1 all WFO cases will be assessed by a case reviewer and designated as falling into one of three categories—''green'' for traditional processing, ''yellow'' for summary judgment, and ''red'' for dismissal.

Red cases are those in which the claim or claims are appropriate for dismissal for failure to satisfy threshold procedural requirements, the memo explained. Yellow cases will be scheduled for summary judgment briefing. If, after briefing, it appears that the cases are not appropriate for summary judgment, they will be processed accordingly. Green cases are those that do not fall under the red or yellow categories, the memo said.

For red cases, it said, notices of proposed dismissal will be issued, and the cases will be assigned to an AJ. For yellow cases, notices of proposed summary judgment will be issued requiring consecutive responses from the parties (agency's motion followed by complainant's response), and the cases will be assigned to an AJ for adoption of the agency response, if appropriate. Green cases will be assigned to an AJ and referred to a clerk for an acknowledgment order, according to the memo.

''Administrative Judges will issue decisions in Red and Yellow cases within 15 days of the expiration of the deadline for the parties to submit all responses to issued Notices,'' the memo said.

Consistency With Existing Rules. Case reviewers will work under the guidance and direction of supervisory administrative judges and the WFO director, with all case assessments reviewed and approved by SAJs, the memo said.

However, it added that ''Administrative Judges will continue to exercise their discretion and judgment in issuing decisions.''

''[N]othing in the program should be understood as requiring anything other than consistency with EEOC Regulations, Management Directive 110, and EEOC Case Law, including *Petty v. Defense Security Service*, Appeal No. 01A24206 (July 11, 2003); and *Murphy v. Army*, Appeal No. 01A04099 (July 11, 2003),'' the memo said. ''In particular, Yellow cases are initially to be briefed and, if appropriate, decided on summary judgment before the parties engage in discovery. However, in considering the parties' summary judgment submissions, AJ's must allow the parties discovery before issuing a decision if the AJ determines that discovery is necessary to a fair adjudication of the Complaint.''

WFO Says AJs Retain Discretion. WFO Acting Director Dana R. Hutter told BNA June 1 that the memo, compared to a draft proposal issued March 25 (42 GERR 343, 4/13/04), emphasizes that EEOC AJs' discretion to decide cases will not be affected by the hearings assessment program.

That was never the intent of the proposal, Hutter said. AJs who disagree with case reviewer recommendations are free to ask for additional discovery, he said.

''In our judgment, some cases need no discovery or only limited discovery,'' he said. These cases under the new system will be placed on a summary judgment track in which the parties are asked to submit briefs arguing either in favor of or against summary judgment , Hutter said.

Previously, he said, all cases were placed on the same track regardless of whether they were simple or complex.

As for the assertion that the AJs' independence will be affected by the change, Hutter responded that ''AJs have always worked under supervision. Nothing's different now.''

Hutter said he met with the AJs' union representatives to discuss the changes before implementing them, and that he believes this fulfilled his obligation to meet with the union over the change, which the WFO considers to be procedural rather than substantive.

According to Hutter, the change was designed to help the WFO process its case load more efficiently and

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should not be considered part of a national EEOC federal sector reform initiative. Reforming the federal sector EEO process is the responsibility of EEOC Chair Cari Dominguez and is ''above my pay grade,'' he said.

Local: No Bargaining Occurred. Regina Andrew, president of Local 3614, told BNA June 3 that the new case assessment procedures constitute a substantive change in the WFO AJs' working conditions and that she does not believe the WFO has fulfilled its bargaining obligation to the union.

Local 3614 in the past has begun negotiating with the WFO over work rule changes by proposing ''ground rules'' for bargaining that include the unions' ideas on items such as how many people will be on the two sides' bargaining teams and how the agreement will be documented, Andrew said. She said that she was in the process of putting together ground rules for the hearings assessment program proposal, based on Hutter's assurances that he was interested in bargaining, at the time the memo was issued implementing the new program.

The apparent change in policy may be due to the involvement of top EEOC officials who are interested in seeing changes in the federal sector EEO program to address existing case load problems, Andrew speculated, adding that the idea of ranking federal sector hearings cases is similar to the priority charge processing procedures being used by the EEOC to triage private sector EEO cases.

Among other things, she said, Local 3614 is concerned that case reviewers may not have sufficient federal sector EEO experience and that AJs may feel compelled to agree with the case assessments they are given.

''If an AJ is told, 'This is not a good case,' do you think the AJ will mix words with their supervisor?'' she asked. If the EEOC moves to some sort of pay-for-performance system, as many federal agencies are doing, AJs will feel even more pressure to fall in line with the case reviewers' recommendations, she said.

BY LOUIS C. LABRECQUE

Election 2004

Office of Special Counsel Warns AFGE That Voter Registration Violates Hatch Act

The American Federation of Government Employees is a politically partisan organization, and therefore federal employees may not engage in AFGE-sponsored voter registration drives while on duty or if the drive is conducted in the workplace, the Office of Special Counsel concluded in a May 25 letter to the union.

OSC warned that employees who participated in AFGE voter registration efforts at work would be considered to be in violation of the Hatch Act's limitations on federal employee partisan political activity. The OSC is charged with enforcement of the Hatch Act for federal workers and employees at the state level whose work is funded by federal monies.

Although AFGE has not directly endorsed a candidate in the 2004 presidential race, the union has engaged in activity designed to prevent President Bush's reelection, and therefore the union is incapable of engaging in a nonpartisan voter registration effort, Associate Special Counsel William E. Reukauf said in the letter.

Reukauf noted that most federal employees may engage in partisan voter registration activity as long as it is off-duty, not on government property, and out-of-uniform.

''Apparently, if you exercise your First Amendment free speech to criticize the policies and positions of the president then you can't conduct voter registration at work,'' Ward Morrow, AFGE assistant general counsel, told BNA June 1.

OSC spokeswoman Cathy Deeds noted June 2 that the April 14 letter is a general advisory opinion in response to the union's general request for advice, while the May 25 letter is a specific opinion on a specific voter registration scenario on which several agencies sought advice.

As for the reasons supporting OSC's opinion that AFGE may not engage in workplace voter registration drives, Deeds said that the May 25 letter's reference to specific evidence of partisan political activity by the union speaks for itself.

Morrow said that AFGE would continue to plan voter registration activities, and would take to court any agency that denied it permission to do so on the basis of OSC's letter.

Union Sought Advice. In 1984, the special counsel advised that union-sponsored voter registration that took place after a union endorsed a particular political candidate violated the Hatch Act. At that time, federal employees were completely prohibited under the act from actively engaging in partisan political activity.

In 1993, the Hatch Act was amended to allow federal employees to engage in partisan political activity, including political campaigns, outside of the workplace.

In the spring of 2004, AFGE asked OSC for an advisory opinion on whether there was an acceptable way for the union to engage in voter registration, even after it made an endorsement.

In an April 14 advisory opinion in which it referenced its 1984 opinion, OSC concluded that the 1993 Hatch Act amendments had not altered its conclusion that it would be ''difficult'' for a union to engage in truly nonpartisan voter registration after it endorsed a political candidate. In fact, OSC emphasized, the 1993 amendments created a viable way for unions to encourage members to vote that would not run afoul of the act.

Morrow noted that the advisory opinion did not say AFGE could not engage in worksite voter registration, but that, consistent with the 1984 opinion, the union should not do so after endorsing a candidate.

Ana Galindo-Marrone, OSC's Hatch Act unit chief, told BNA June 3 that the opinion does not rely on an endorsement as the only, or even primary, factor in considering whether political activity is partisan. In the 1984 opinion, the relevant factor was an endorsement and therefore the discussion in the more recent opinion letters discussed that scenario, she said.

An endorsement is only one of the criteria that is considered when looking at the factor identified in the April 14 opinion letter as ''the degree to which the organization has become identified with the success or failure of a partisan political candidate, issue, or party,'' Galindo-Marrone explained.

The basis for looking at that factor is in the Hatch Act's definition of ''political activity,'' which states that such activity is considered partisan if it is designed to engender ''the success or failure of a candidate,'' Galindo-Marrone said. ''The inclusion of 'or' in the language of the statute was intentional,'' she said, so that it would not just cover activism in favor of a candidate such as an endorsement.

Follow-Up OSC Letter. Morrow said that at the Social Security Administration's Seattle office, AFGE local staffers asked the agency for another table in the lobby to conduct the union's voter registration efforts that would separate the efforts from those conducted at its regular table, which displayed union membership and benefits information.

''Ironically, it may have been those efforts to ensure a nonpartisan voter drive that showed we were serious about voter registration, caught the attention of OSC,'' and caused it to revise its opinion through the May 25 letter, Morrow said.

The May 25 letter, which OSC characterized as a ''follow-up'' to its advisory opinion, came as a complete surprise, Morrow said. OSC said that its letter was in response to requests for advice from several federal agencies in which AFGE had sought to engage in voter registration.

Upon further review of the situation, OSC said, it believed that, even before it endorsed a specific political candidate, AFGE ''is unable to conduct a truly nonpartisan registration drive.'' Therefore, federal employees are prohibited by the Hatch Act from participating in AFGE-sponsored registration efforts while at work, OSC said.

''AFGE has become identified publicly and repeatedly with the failure of a presidential candidate, namely George W. Bush,'' OSC said.

OSC cited AFGE President John Gage's published statements concerning the president's policies, as well as television advertisements setting forth AFGE's criticism of the president's contracting out policy, as examples of partisan political activity.

Bush Resume Cited. OSC also noted a Bush ''resume'' that was circulated by a union official to several people. ''The document is filled with allegations of incompetence and malfeasance and is clearly directed at Mr. Bush's defeat in the upcoming election,'' OSC said. OSC said it was investigating whether the incident involved Hatch Act violations.

''That was the first we had heard that some of our members were allegedly being investigated for Hatch Act violations,'' Morrow said. Morrow characterized the Bush ''resume'' as being nothing more than a joke, and said the other examples of partisanship cited by OSC are merely ''a union and its members exercising their free speech rights.''

OSC also said that an argument could be made that AFGE was engaged in partisan politics because its parent international labor organization, the AFL-CIO, has endorsed the Democratic candidate, Sen. John F. Kerry (D-Mass.), for president (42 GERR 174, 2/24/04).

Morrow noted that AFGE specifically abstained from the AFL-CIO's endorsement vote, and that it would not decide whether to make an endorsement until late June, at the earliest.

The union has brought matters it believed might be Hatch Act violations to the attention of the special counsel without getting any satisfactory response from OSC, Morrow said.

In one instance, AFGE noted that the White House asked the Defense Department to circulate a message to all employees detailing the proper way for them to reach the Bush reelection campaign without violating the Hatch Act. ''OSC said it was an educational memo meant to ensure that there were no Hatch Act violations,'' Morrow related. ''They never addressed the main point, which is that this wasn't a memo about how to avoid problems for contacts with any political campaign, but only on how to contact the Bush campaign.''

''This all shows that OSC has become politicized,'' Morrow said. ''They are engaged in selective interpretation and enforcement of the Hatch Act.''

The OSC April 14 advisory opinion is available at http://www.osc.gov/documents/hatchact/federal/fha-31.pdf.

BY DONALD G. APLIN

Airport Screeners/Whistleblowers

Special Counsel Argues TSA Screeners Have Whistleblower Appeal Rights at Merit Board

Transportation Security Administration federal employee airport screeners should be allowed to pursue whistleblower retaliation individual right of action appeals before the Merit Systems Protection Board for adverse agency actions taken after TSA became part of the Homeland Security Department, the Office of Special Counsel is arguing in a friend-of-the-board brief filed with the MSPB last month.

The board currently is considering three TSA employee cases on petitions for review from separate decisions by MSPB administrative judges, which all ruled that under the Homeland Security Act the board lacked jurisdiction over IRA appeals by TSA screeners (*Schott v. TSA*, MSPB, No. DC-1221-03-0807-W-1, *brief filed* 5/6/04; *Jiggetts v. TSA*, MSPB, No. NY-0752-0378-I-1, *brief filed* 5/6/04; *Younger v. TSA*, MSPB, No. NY-1221-04-0056-W-1, *brief filed* 5/6/04).

OSC filed a single 14-page brief for all three cases, noting that the board has been asked by the employee appellants to consolidate the three petitions for review and that the issue of whether MSPB has jurisdiction over TSA screener IRA appeals is one of first impression before the board.

Gony Frieder, an attorney with the American Federation of Government Employees, told BNA June 3 that there are several other TSA screener cases in which AJs have ruled that the board lacks jurisdiction. The petitions for review in those cases are being held in abeyance until resolution of the current cases on review, since the decision essentially will resolve the jurisdiction for all such cases, Frieder said.

AFGE has been leading the thus-far unsuccessful effort to organize TSA screeners for collective bargaining purposes by challenging a January 2003 TSA order exempting screeners from collective bargaining rights on the basis of national security interests (42 GERR 531, 6/1/04).

''MSPB jurisdiction is critical to screeners' ability to report airport security concerns without fear of re-

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prisal,'' Special Counsel Scott J. Bloch said in a May 24 statement explaining OSC's decision to file the brief.

''When Congress created the Department of Homeland Security, they made it clear that whistleblower protection is an integral part of protecting homeland security,'' Bloch said. ''Providing full whistleblower protections to screeners will help ensure that Congress's goals in establishing DHS are realized.''

IRA Appeals. Under the Whistleblower Protection Act, federal employees may seek review of agency adverse actions that allegedly were taken in retaliation for protected whistleblower activity. In order to invoke the MSPB's direct appeal jurisdiction, the adverse actions must reach the level of a suspension for 14 days or more.

To protest less serious agency actions, an employee must appeal to OSC. The OSC may take the case on behalf of the employee and, in effect, ''prosecute'' the case before the board. On the other hand, if after investigating the allegations, the OSC rejects the appeal or fails to act in a timely manner on the appeal, the employee may pursue an IRA appeal with the board.

As the special counsel noted in the statement of interest in its friend-of-the-board brief, if the board rules that MSPB lacks jurisdiction over such IRA appeals, OSC also would lack jurisdiction to continue to accept and investigate any screener whistleblower complaints filed by the approximately 45,000 TSA screeners.

Congress Intended Coverage, OSC Argues. In all three initial MSPB decisions, the AJs ruled that the Aviation and Transportation Security Act (ATSA) does not confer TSA screener IRA appeal jurisdiction on MSPB. In two of the cases, the AJs also ruled that the Homeland Security Act of 2002 (HSA) does not alter MSPB's ability to exercise jurisdiction over such cases.

While the ATSA (49 U.S. Code Section 111(d)) gave extraordinary power to the Secretary of Transportation to set the working conditions for the new federal employee airport screener workforce, including the ability to suspend any whistleblower protection rights for screeners, as of March 1, 2003, the TSA became part of DHS, the special counsel emphasized, noting that all three of the cases at issue involve agency actions that occurred after the March 1 transfer to DHS.

While the Secretary of Homeland Security is provided the authority to establish a new personnel system for DHS employees, the statute does not permit the secretary to modify or waive any statutory whistleblower protections, OSC said. Therefore, the proposed regulations presenting the new DHS personnel system (42 GERR 167, 2/24/04) do not attempt to change any of those whistleblower protection rights, OSC said. It noted that, in fact, TSA is not included in the personnel scheme proposed.

Under the HSA, Congress provided that all DHS employees, including TSA screeners, would have the same whistleblower protection rights as other federal employees, OSC argued.

One provision of HSA (Section 1512(e)(2)) states that no employees transferred to DHS would have employment rights that existed before the transfer, including whistleblower protection rights, altered during the time before any new personnel system is approved. OSC said that if read alone, as apparently TSA would have the board do, the provision would mean that TSA screeners who lacked whistleblower protection while under the Transportation Department's jurisdiction would continue to lack such rights after the transfer to DHS.

However, another provision in the HSA (Section 883) states that nothing in the law should exempt DHS from providing whistleblower protection rights for all of its employees, OSC noted. ''Section 883 thereby serves one purpose and one purpose only: to ensure whistleblower rights for DHS employees not otherwise protected by the Act; namely TSA screeners,'' OSC said.

Even the authority granted to DHS in Section 841—to continue to modify the rights of employees as national security needs dictate—does not allow the agency to waive OSC's investigative and enforcement authority over IRA appeals or waive the list of prohibited personnel practices, including whistleblower retaliation, from which federal employees are protected, OSC emphasized.

OSC argued that the various provisions of the statute can be read harmoniously. Thus, while the compensation and other conditions of employment for screeners can be modified, their whistleblower protection rights still are respected.

Finally, OSC argued that, if there is any incongruity between the ATSA and HSA, the HSA provisions providing whistleblower protection for screeners must prevail since it is the more recently passed statute, is the more specific statutory provision, and to find otherwise would render superfluous Section 883's intended purpose of providing whistleblower protection to TSA screeners.

Special Counsel Scott J. Bloch, and Cary P. Sklar and Patrick H. Boulay of the OSC in Washington, D.C., filed the friend-of-the-board brief on behalf of the OSC.

BY DONALD G. APLIN

Benefits

Legislation to Eliminate TSP Open Seasons Passed by Senate Governmental Affairs Panel

Federal employees would have the option of opening, closing, or making changes to their Thrift Savings Plan accounts at any time under legislation approved June 2 by the Senate Governmental Affairs Committee that would eliminate the current biannual open seasons for making changes to TSP accounts.

The Thrift Savings Plan Open Elections Act (S. 2479), introduced May 21 by committee chairman Sen. Susan Collins (R-Maine), would amend Chapter 84 of Title 5 of the U.S. Code to allow federal workers to open, modify, or terminate TSP accounts at any time. It also calls for the Federal Retirement Thrift Investment Board periodically to evaluate whether federal employees have the information needed to understand their TSP options, and to report annually to Congress on the board's TSP education efforts.

The TSP is a tax-deferred retirement savings plan for federal employees, similar to tax code Section 401(k) plans for private sector employees. Currently, the federal government allows employees to make changes to their TSP accounts during open seasons that run from April 15 through June 30 and from Oct. 15 through Dec. 31. New federal employees have 60 days to open a TSP account, or they can wait for the next open season.

Also approved by the committee at the June 2 markup, which focused primarily on amendments to the Postal Accountability and Enhancement Act (S. 2468) (see related report below), was legislation (S. 2322) that would allow District of Columbia courts employees to participate in the federal employee long-term care insurance program. The long-term care program was launched March 25, 2002, as an optional insurance program for federal workers (40 GERR 345, 4/2/02).

Both of the benefits bills were approved by the committee by voice vote without amendments.

The House Government Reform Subcommittee on Civil Service and Agency Organization recently approved wide-ranging federal workforce legislation (S. 129), originally introduced in the Senate by Sen. George Voinovich (R-Ohio), that among other things also would allow federal employees to make changes to their TSP accounts at any time (42 GERR 493, 5/25/04).

Postal Service

Senate Government Affairs Committee Unanimously Approves Postal Reform Bill

The Senate Governmental Affairs Committee June 2 unanimously approved the Postal Accountability and Enhancement Act of 2004 (S. 2468), which is aimed at reforming the financially beleaguered Postal Service.

The Postal Service faces about $90 billion in unfunded liabilities and other obligations, according to the General Accounting Office, which has described the need for postal reform as ''urgent.''

CSRS Pension Benefits. The bill would repeal a provision regarding payments to the Civil Service Retirement System Fund (CSRS) that would essentially ''free up'' $78 billion over a period of 60 years. The funds are now being held in an escrow account.

The Postal Service would use these savings to pay off debt to the Treasury Department, fund health care liabilities, and mitigate rate increases.

The bill also would return to the Treasury Department the responsibility for funding CSRS pension benefits relating to the military service of postal retirees. No other federal agency is required to make this payment.

The bill also would give USPS the authority, consistent with every state-run workers' compensation plan, to transition individuals receiving workers' comp to a retirement annuity when the affected individuals reach the age of 65. It also puts into place a three-day waiting period before an employee is eligible to receive workers' compensation pay.

Floor Action Anticipated. Postal experts and congressional staffers view the committee's unanimous vote and the House Government Reform Committee's May 12 unanimous vote on its version of postal reform legislation, the Postal Accountability and Enhancement Act (H.R. 4341) (42 GERR 493, 5/25/04), as indicators that floor action in both chambers may occur by the end of the month.

Both Senate Majority Leader Bill Frist (R-Tenn.) and House Majority Leader Tom DeLay (R-Texas) recently have listed postal reform as a priority. The Bush administration has urged Congress to approve such legislation this year.

Postmaster General Comments. Although the Postal Service is still examining the details of H.R. 4341 and S. 2468, U.S. Postmaster General John E. Potter said May 26 that both bills would help the USPS better manage its finances by repealing the CSRS escrow fund provision and returning responsibility for funding CSRS pension benefits relating to the military service of postal retirees back to the Treasury Department.

Potter, in a speech in Massachusetts, cited other items in the bills as being of concern, including provisions requiring the Postal Service to prefund health benefit retirement obligations, which, based on the pace of implementation, would put upward pressure on prices.

''Our evaluation indicates the costs could be as high as $3.9 billion in 2006, or a 6.5 percent rate increase over and above our forecast,'' Potter said.

Human Capital

NPS Retirees Say Job Vacancies Hurt Parks; Visitor Needs Being Met, Park Service Says

National Park Service field positions left unfilled because of budget constraints will negatively impact visitors to national parks this summer and in the future, a group of Park Service retirees charged May 27.

According to the Coalition of Concerned National Park Service Retirees, Park Service Director Fran P. Mainella understated the reality of the situation when she told Congress March 25 that current funding levels are adequate to fulfill the agency's mission. Mainella told the House Interior Appropriations Subcommittee that she was restricting employee domestic travel and cutting most foreign travel as one way to cover other costs (42 GERR 324, 4/6/04). The coalition argued that, even if all of the agency's yearly travel budget was cut, it would not cover what they say is the $600 million needed to ensure adequate park services.

The coalition, which includes retired directors and deputy directors of the Park Service, reported that all of the 12 parks it studied as a representative sample have vacant positions, including law enforcement officer positions, which will remain vacant unless Congress approves further funding. Overall, the number of permanent park service employees is down about 1 percent from 17,035 positions in September 2003 to 16,930 positions as of March 2004, the group said. Hiring of seasonal employees needed to meet the increase in summer visitors also is down significantly and at some parks represents a nearly 75 percent decrease from the previous year, the coalition said.

Tight Budget Forces Choices. ''Nobody is trying to hide the fact that we're on a tight budget,'' Park Service spokeswoman Elaine Seve told BNA June 3. Director Mainella has been ''honest with Congress that the service has to make choices about what things to prioritize,'' Seve said.

The Park Service has seen a 4 percent growth in the total number of full-time employees since 2000, Seve said. However, Seve said most of that growth has been

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in adding law enforcement personnel to meet new homeland security concerns, addressing firefighting demands caused by severe wildfire seasons, and getting staff on board to handle the park maintenance backlog.

Seve confirmed that there will be a decrease in the number of seasonal employees hired this year, but added that Mainella has relied on park superintendents to set staffing and other budget priorities because they are in the best position to assess specific park needs. Some of the funds taken from the travel budget have been set aside to address specific needs brought up by the superintendents, Seve said.

''If we need to take care of some staffing need that arises at a specific park, the director can do that,'' Seve said. ''The bottom line is that people will still have a quality experience at the national parks.''

The House Interior Appropriations Subcommittee June 3 approved by voice vote a fiscal year 2005 spending measure that increases funding for national park operations by $33 million over the administration's request.

BY DONALD G. APLIN

The report, ''Pretending to Protect the Parks: Mainella and Norton's Legacy of Neglected National Parks in Decline,'' is available at http://www.protectamericaslands.org/documents/psurvey_complete.pdf.

In Brief

NAPA Seeks Governmentwide Pay-for-Performance

All federal employees should be compensated under a pay-for-performance system, and that system should be put in place by 2009, the National Academy of Public Administration recommended in a report issued May 24.

The existing general schedule pay system ''no longer meets federal agency needs and should be replaced'' within five years, NAPA said. Placing employees in compensation bands rather than using the regimented GS level and step matrix would allow agencies to better compensate high-performing employees, NAPA said. Broadbanding has already been successfully used by some agencies and ''provides a well-established framework for salary systems,'' NAPA said.

NAPA recommended using up to 15 occupational pay categories for similar jobs and salaries grouped into four large pay bands for entry level, established performance, senior or expert, and first-level supervisor. Additional bands should be established for more senior managers, NAPA said. NAPA also suggested pegging the pay bands to market rates for workers in the regional private sector performing similar tasks. NAPA predicted that such a system could obviate the need for most locality pay enhancements.

NAPA noted that ongoing large-scale personnel reform efforts, including proposals to move to performance-based compensation at the Defense Department and Homeland Security Department, as well as existing pay-for-performance flexibilities being utilized by the Internal Revenue Service, General Accounting Office and Federal Aviation Administration, will already result in a large portion of the federal workforce being moved out of the GS pay system.

Agencies should ensure that federal employees do not experience reductions in their current pay due to the transition to a new broadbanding compensation system, NAPA said.

The NAPA report, ''Recommending Performance-Based Federal Pay,'' is available at http://www.napawash.org/Pubs/Broadbanding5-04.pdf.

HHS to Use Direct-Hire Authority for CMS Positions

The Health and Human Services Department has received direct-hire authority to staff quickly certain critical positions in the Centers for Medicare and Medicaid Services (CMS), the Office of Personnel Management announced June 1.

According to OPM Director Kay Coles James, HHS will use the authority to implement the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), which she said will provide Medicare beneficiaries with access to prescription drug coverage and the buying power to reduce the prices they pay for drugs. To implement the MMA, James said, CMS will need to fill approximately 250 CMS positions in fiscal year 2004 and another 250 positions in fiscal 2005.

An HHS spokesman told BNA June 4 that the department will use the authority to hire health information specialists, actuaries, and economists.

''CMS's request for direct-hire authority is a perfect example of an agency addressing their human capital needs and utilizing current flexibilities to address a critical need situation,'' James said. OPM will review all agencies' use of direct-hire authority to ensure it is being used properly, she added.

DOD Revises Non-Foreign Overseas Per Diem

The Defense Department has published a notice of revised per diem rates for non-foreign overseas travel by civilian federal employees (69 Fed. Reg. 30635, 5/28/04).

The new schedule of maximum lodging and maximum meals and incidentals rates, identified as ''Civilian Personnel Per Diem Bulletin Number 234,'' became effective June 1.

The bulletin updates maximum lodging and meals and incidentals per diem rates for travel costs in Alaska, American Samoa, and Hawaii.

Per diem bulletins published in the *Federal Register* are the only notification to agencies of DOD non-foreign overseas per diem changes. The current non-foreign overseas per diem rate schedule for all localities is available at http://www.dtic.mil/perdiem/pdrates.html.

OPM Finalizes Physician Pay Comparability Rule

The rule governing the provision of extra compensation for federal employee physicians in certain positions that are difficult to fill has been finalized by the Office of Personnel Management (69 Fed. Reg. 27817, 5/17/04)

The physicians' comparability allowance is used to recruit and retain doctors by providing the ''minimum amounts necessary'' to encourage physicians to enter into term agreements with their federal agency employers, OPM said.

Based on comments on the proposed rule, OPM added language to the final rule to clarify that the extra

compensation is not available for less than half-time or intermittent basis federal employee physicians.

For further information on the final rule, contact Vicki Draper by telephone at (202) 606-2858, by fax at (202) 606-0824, or by e-mail at pay-performance-policy@opm.gov.

State and Local News

First Responders

House Panel Approves FY 2005 DHS Budget; Less First Responder Funds Than Fiscal 2004

The House Appropriations Subcommittee on Homeland Security June 3 approved a $30.8 billion fiscal year 2005 budget bill for the Homeland Security Department that includes less money for state and local first responder grants and other financial assistance than the current fiscal year.

The bill would increase overall spending by $1.5 billion, or 5.3 percent, over fiscal year 2004 enacted levels, but is $308 million, or 1.0 percent, below the president's request.

The bill includes $4.1 billion for state and local first responders, including grants to high-threat areas, firefighters, and emergency management, but that number is down from the FY 2004 level of $4.4 billion.

The fiscal 2005 $4.1 billion total includes $1.25 billion for Office of Domestic Preparedness basic formula grants; $1.0 billion for grants to high-threat, high-density urban areas, including no less than $100 million for rail security; $600 million for firefighters; $500 million for state and local law enforcement terrorism prevention grants; $185 million for first responder training; $170 million for emergency management performance grants; and $125 million for port security grants.

Firefighter Funding Concerns. Subcommittee ranking member Martin O. Sabo (D-Minn.) said that ''very serious gaps'' exist in the bill. ''We're falling short and the administration is falling amazingly short,'' Sabo said.

Both Sabo and House Appropriations Committee ranking member David R. Obey (D-Wis.) said spending on firefighters also was inadequate. Obey said the nation has fewer firefighters than it did three years ago.

''We're nibbling around the edges and we're going to pay for it big time some time,'' Obey said.

However, subcommittee chairman Harold Rogers (R-Ky.) noted that states and localities still have $27 billion in unclaimed first responder funding from the current fiscal year appropriation.

The full committee is scheduled to mark up the bill June 9.

Layoffs

Planned Job Cuts Increased in May For Second Month, Challenger Reports

The government and nonprofit jobs sector announced 7,532 job cuts in May, outplacement firm Challenger, Gray & Christmas said June 1.

In the first five months of 2004, layoffs in the government and nonprofit sector totaled 42,421, down two-thirds from 128,765 in the first five months of 2003, when this sector was first in jobs cuts, Challenger said.

Overall, layoffs announced by U.S. employers in May edged upward to 73,368 from 72,184 the previous month, Challenger reported. The 1.6 percent increase brought total planned job cuts for the first five months of the year to 408,392, down 28 percent from the same period in 2003, when 570,817 layoffs were announced.

The May job cuts were 6.9 percent higher than a year earlier, however, when 68,623 layoffs were announced—the first year-over-year increase since December, the firm said.

Challenger's 12-month moving average, which smooths out volatility in month-to-month tabulations, rose slightly to 89,500 in May from 89,105 in April.

The firm noted that overall, job cuts are down from last year and significantly lower than the record numbers during the economic downturn in 2001 and 2002. But there are still some ''worrisome trends,'' Chief Executive Officer John Challenger said. He noted that while the number planned layoffs have stayed under 100,000 for four consecutive months, it has not fallen to pre-recession levels, when job cuts averaged about 51,000 per month.

Despite the general decline in downsizing over the past year, employers announced 1,074,000 job cuts during the 12 months ended in May, the Challenger report said.

For the first time in May, the Challenger firm tracked employer hiring announcements. In May, employers planned to hire 55,307, with government employers reporting 12,848 job announcements.

Retirement Plans

Union Can Offer and Administer Plan Maintained by Governmental Employers

The Internal Revenue Service May 24 released a revenue ruling that allows a labor union to offer and administer a deferred compensation governmental plan under tax code Section 457(b) for a state's governmental employees who are union members. The plan would be established and maintained by governmental employers that employ members of the collective bargaining units represented by the union.

According to the ruling, a labor union proposed to offer a Section 457(b) plan for union members employed by governmental employers that adopted the plan. Only employees of governmental employers that adopt the plan are eligible to participate in the plan, and no contribution may be made on behalf of any employee whose employer has not adopted the plan. Union employees would not be eligible to participate in the plan.

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In ruling that the union could offer the plan, IRS noted that an ''eligible deferred compensation plan'' under Section 457(b) must be maintained by an eligible employer and that only individuals who perform services for that employer can participate in the plan.

A union that is a tax-exempt entity can offer a Section 457(b) plan, but the code requires that the plan be unfunded and established only for the union's employees or other individuals who perform services for the union, IRS said. A governmental employer that offers a Section 457(b) plan, however, must fund the plan and establish the plan only for employees of or other individuals that perform services for the state, IRS added.

Revenue Ruling 2004-57 will appear in Internal Revenue Bulletin 2004–24, dated June 14, 2004.

In Brief

AFT President Feldman Will Not Seek Re-Election

Sandra Feldman, who has served as president of the 1.3 million-member American Federation of Teachers since May 1997, said May 26 that she does not plan to run for re-election at the union's convention in mid-July.

In remarks to a gathering of about 400 AFT leaders and staff attending a meeting in New York City, Feldman cited a recurrence of breast cancer that requires weekly treatments as the reason for her decision. Also in an e-mail to staff and union locals, she said that the travel required to fulfill her duties as president would be a serious impediment to her recovery.

AFT Secretary-Treasurer Edward McElroy, who has been covering the responsibilities of the president while Feldman has been on leave, is expected to continue in that role until the July 12-17 convention in Washington, D.C., at which time he will run for the top post, according to an AFT source. McElroy has served as secretary-treasurer since 1992.

Feldman, a former schoolteacher, is the union's first female president as well as the first female president of a major international union. She was elected to the AFL-CIO Executive Council in May 1997.

From 1986 through 1997, Feldman was president of the 130,000-member United Federation of Teachers in New York City, the AFT's largest union local. During that time, she also served as a vice president of the AFT.

Census State, Local Job Market Statistics Now Online

The Census Bureau June 1 launched a new Internet resource that will provide regularly updated measurements of job markets in states and local areas.

The Quarterly Workforce Indicators, which are now available online for the first quarter of 2003 and the preceding 10 years, include labor statistics for 19 states, including counties and metropolitan areas, by industry, age group, and gender.

Developed as part of the bureau's Local Employment Dynamics program in partnership with agencies in 29 states, the workforce indicators measure ''the performance of the local economy—where jobs are, for what kind of workers, how much workers can expect to make and [how much] employers expect to pay them,'' according to the QWI Web site.

Quarterly Workforce Indicators information, reports, and data tables are available on the Census Bureau's Web site at http://lehd.dsd.census.gov/led/01/index.html.

State Regulatory News

The following entries are summaries of proposed and recently enacted state regulations dealing with workplace issues. Full text of a document summarized in this section is available for a fee from BNA PLUS at 800-452-7773, or in Washington, D.C., (202) 452-4323.

New Jersey

State Health Benefits Program

Final rule of the Department of the Treasury, Division of Pensions and Benefits, adopts regulations under a new N.J. Admin. Code § 17:9-11 to establish that part-time employees of the state and institutions of higher education may participate in the State Health Benefits Program at group rates without any exclusions for pre-existing conditions. The rule became effective May 17 and expires Oct. 9, 2008. Contact: Mindy Smith-Sopko, Department of the Treasury, Division of Pensions and Benefits, (609) 777-1777.

Ohio

Police and Fire Pension Fund

Final rule of the Police and Fire Pension Fund amends regulations under Ohio Admin. Code § 742-5-09 to revise requirements for the purchase of layoff credit. The rule became effective May 24. Contact: Diane Lease, PFPF, (614) 628-8361.

State Teachers Retirement System

Final rule of the State Teachers Retirement System amends regulations under Ohio Admin. Code § 3307:1-3-01 and 3307:1-13-01 regarding defined benefits. The rule addresses interest rate and cost calculation for restoration and purchased service and reemployment restrictions applicable to retirees. The rule became effective May 24. Contact: Terri Bierdeman, STRS, (614) 227-2983.

State Teachers Retirement System

Final rule of the State Teachers Retirement System amends regulations under Ohio Admin. Code § 3307:2-4-03 regarding defined contributions. The rule addresses combined plan participant leaves of absence. The rule became effective May 24. Contact: Terri Bierdeman, STRS, (614) 227-2983.

Legal News

Gender Discrimination/Retaliation

Sixth Circuit Revives Transsexual Fireman's Sex, Retaliation, and Constitutional Claims

The bias allegations of a firefighter with gender identity disorder who self-identifies as transsexual were mischaracterized by a federal district court, which erroneously ignored controlling U.S. Supreme Court authority in rejecting his discrimination and equal protection claims, the U.S. Court of Appeals for the Sixth Circuit has held (*Smith v. Salem,* 6th Cir., No. 03-3399, 6/1/04).

''Relying on *Price Waterhouse*—which held that Title VII [of the 1964 Civil Rights Act's] prohibition of discrimination 'because of . . . sex' bars gender discrimination, including discrimination based on sex stereotypes—[Jimmie] Smith contends on appeal that he was a victim of discrimination 'because of . . . sex' both because of his gender non-conforming conduct and, more generally, because of his identification as a transsexual. We find both bases of discrimination actionable pursuant to Title VII,'' Judge R. Guy Cole Jr. wrote.

In granting summary judgment to Salem, Ohio, and other defendants, the trial court ''erred in relying on a series of pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection,'' a unanimous appeals panel ruled. Those cases, which held that Title VII protected only sex, not gender, were ''eviscerated by *Price Waterhouse*,'' it said.

Moreover, even if Smith had not alleged that he was suspended for his gender non-conforming behavior and appearance but simply for being transsexual, he still stated a valid claim, the court determined. ''Discrimination based on transsexualism is rooted in the insistence that sex (organs) and gender (social classification of a person as belonging to one sex or the other) coincide. This is the very essence of sex stereotyping.''

The facts also support Smith's 42 U.S. Code Section 1983 equal protection claim, the court found. In addition, it said, in light of its recent decision in *White v. Burlington N. & Sante Fe Ry. Co.*, 364 F.3d 789, 93 FEP Cases 1011 (6th Cir. 2004) (*en banc*), Smith also established that he was subjected to an adverse employment action, and thus established prima facie cases of discrimination and retaliation.

Gender Identity Disorder. Smith had been a lieutenant in the Salem Fire Department for seven years when he was diagnosed with gender identity disorder (GID). The American Psychiatric Association defines the condition as ''a disjunction between an individual's sexual organs and sexual identity.''

After his diagnosis, Smith started to express ''a more feminine appearance on a full-time basis'' and his coworkers began to confront him and comment that his appearance and mannerisms were not ''masculine enough.'' In response, he told Thomas Eastek, his immediate supervisor, about his GID diagnosis and treatment. He also explained to Eastek that his complete physical transformation from male to female would probably be necessary and asked him not to report the substance of their conversation to fire chief Walter Greenamyer or other superiors, the court noted.

Eastek, however, told Greenamyer about Smith's behavior and his GID, and the latter met shortly afterwards with the city's law director ''with the intention of using Smith's transsexualism and its manifestations as a basis for terminating his employment,'' the court found. An unauthorized meeting of the city's executive body was arranged and it was decided that Smith would be required to undergo three separate psychological evaluations with physicians of the city's choosing in hopes that he would quit or refuse to comply and thereby provide grounds for his termination, the court said.

After Smith learned of the plan, his attorney called the mayor and warned of the potential legal ramifications if the city followed through. Four days later, Smith received a right-to-sue letter from the Equal Employment Opportunity Commission, and four days after that he was suspended for a 24-hour shift for an alleged infraction of a city and/or departmental policy.

Following a hearing, the Salem Civil Service Commission upheld his suspension. However, the Columbiana County Court of Common Pleas reversed, concluding that ''[b]ecause the regulation [that Smith was alleged to have violated] was not effective[,] [Smith] could not be charged with violation of it.''

Smith sued the city, Eastek, Greenamyer, and others in the U.S. District Court for the Northern District of Ohio, asserting claims for sex discrimination and retaliation under Title VII and Section 1983, and invasion of privacy and civil conspiracy under state law. The trial court granted judgment on the pleadings to the defendants as to the federal claims and declined supplemental jurisdiction over the state claims.

'Transsexual Label Not Fatal.' Smith argued on appeal that the trial court improperly ruled that (1) he failed to state a claim of sex stereotyping, (2) Title VII does not cover transsexuals, (3) he failed to show that he had experienced an adverse employment action, and (4) he failed to make out a claim under Section 1983. The Sixth Circuit agreed.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 49 FEP Cases 954 (1989), Cole explained, the Supreme Court held that Title VII does not just bar discrimination but also prohibits remarks connoting sex stereotyping, such as comments that a female employee should take ''a course at charm school,'' ''walk more femininely,'' and ''wear make-up.'' The Supreme Court emphasized that ''we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group,''

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the court said. It added that as Judge Richard A. Posner of the Seventh Circuit has explained, ''the term 'gender' is one 'borrowed from grammar to designate the sexes as viewed as social rather than biological classes.' ''

Smith's allegations that his failure to conform to sex stereotypes concerning how a man should behave and look was the driving force behind the city's actions were sufficient to plead claims of sex stereotyping and gender discrimination, the court held. It rejected the trial court's ''implication'' that his ''claim was disingenuous,'' and ''merely 'invokes the term-of-art created by *Price Waterhouse*, that is, ''sex-stereotyping,'' ' as an end run around his 'real' claim, which, the district court stated, was 'based upon his transsexuality.' '' The appeals court also rejected its conclusion that ''Title VII does not prohibit discrimination based on an individual's transsexualism.'' The cases relied on by the district court were decided prior to *Price Waterhouse* and were inapposite, the appeals court concluded.

These and later cases ''cannot be reconciled with *Price Waterhouse*, which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual,'' Cole wrote.

''[D]iscrimination against a plaintiff who is a transsexual—and therefore fails to act like and/or identify with the gender norms associated with his or her sex—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman,'' the court said. ''Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.''

Moreover, Smith sustained a cause of action for sex bias based solely on the allegation that he was suspended because he is transsexual, the court held. ''By definition, transsexuals are individuals who fail to conform to stereotypes about how those assigned a particular sex at birth should act, dress, and self-identify.'' Such identification, it said, ''itself violates the prevalent sex stereotype that a man should perceive himself as a man,'' and provides the basis for an actionable claim.

Other Claims Also Revived. The court also revived Smith's constitutional and retaliation claims

The facts alleged in support of Smith's Title VII gender claims ''easily constitute a claim of sex discrimination grounded in the Equal Protection Clause of the Constitution, pursuant to § 1983,'' the court said. It cited *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004) (42 GERR 377, 4/20/04).

Relying on *White v. Burlington N. & Sante Fe Ry. Co.*, 310 F.3d 443, 90 FEP Cases 388 (6th Cir. 2002), the district court ruled that Smith's Title VII discrimination and retaliation claims likewise failed because the court of common pleas' reversal of his suspension meant that he did not experience an ''ultimate employment decision.'' This was error, the appeals court concluded.

''[T]his Circuit has since vacated and overruled *White* . . . and joined the majority of other circuits in rejecting the 'ultimate employment decision' standard,'' Cole noted. And even if that standard pertained, the district court still erred, he said, because ''[t]here is no legal authority for the proposition that reversal by a judicial body—as opposed to the employer—declassifies a suspension as an adverse employment action.''

Judges William W. Schwarzer and Ronald L. Gilman joined in the court's opinion.

Randi A. Barnabee of Deborah A. Smith & Co. in Northfield, Ohio, represented Smith.

Aretta K. Bernard of Roetzel & Andress in Akron, Ohio, represented the city and the other defendants.

Race Discrimination

Postal Managers' Individual Claims Restored, But Hispanic Class Action Dismissal Affirmed

Individual employee discrimination claims can satisfy administrative exhaustion requirements through an agency-level class action bias complaint, the U.S. Court of Appeals for the Tenth Circuit has decided (*Monreal v. Potter,* 10th Cir., No. 02-1195, 5/17/04).

Judge David M. Ebel reversed the trial court's dismissal of individual race discrimination claims of seven Postal Service Hispanic managers and remanded their claims under Title VII of the 1964 Civil Rights Act for further proceedings.

However, the appeals court agreed with the district court that the plaintiffs as a group did not present a valid class claim and affirmed the dismissal of that portion of their complaint.

Discrimination, Retaliation Alleged. Between 1994 and 1996, three of the seven plaintiffs filed individual administrative bias claims with the U.S. Postal Service alleging denials of promotion, threatened discipline, and other harassment due to their race, as well as filing retaliation claims for pursuing Title VII charges.

In June 1996, five plaintiff managers, including the three who had first brought individual bias complaints, filed an initial charge with USPS, alleging a pattern and practice of discrimination against Hispanic managers.

In September 1996, the five managers were joined by two new plaintiffs in filing a class action formal administrative complaint with the agency. In that complaint, six of the seven plaintiffs also included individual allegations of discrimination. The new individual claims of the managers who had first filed claims between 1994 and 1996 were based on subsequent acts of alleged bias that were not included in their initial individual claims.

The class complaint was forwarded to the Equal Employment Opportunity Commission. After the EEOC failed to issue a decision on the complaint within 180 days, the plaintiffs filed suit in federal district court, including both class allegations and individual claims.

Ultimately, the EEOC and Postal Service rejected all of the individual claims as well as the class complaint.

The trial court threw out the individual claims of four managers who made their individual claims exclusively in the administrative class complaint for failing to exhaust the required administrative process at the agency and EEOC level on each individual claim.

For the three managers who had filed individual claims in advance of the administrative class complaint, the trial court ruled that they should have appealed or asked for reconsideration of the dismissal of their claims by EEOC and the agency, and so had not ex-

hausted the available administrative remedy before filing in federal court.

All Claims Administratively Exhausted. The appeals court said the parties agreed that the trial court erred in dismissing the individual claims of the three managers who filed with the agency before the class action.

Although the managers had the option to appeal the agency dismissal of their claims to the EEOC and request reconsideration if their appeal was then denied by EEOC, they were not obligated to do so in order to satisfy the administrative exhaustion requirement, the appeals court ruled in reinstating those individual claims.

The court rejected the Postal Service's challenge that the same claims were not timely filed, finding that because the service had never before cited a timeliness defense, it had waived the opportunity to raise it on appeal.

As for the individual complaints filed within the context of the administrative class complaint, the court acknowledged that EEOC regulations address individual and class complaints in different sections. However, ''we find that they do not mandate exclusive presentation of individual claims of discrimination in individual complaints,'' the court said.

The plaintiffs were permitted to assert individual claims within a class action civil complaint, the court ruled. The appeals court noted that EEOC regulations on class actions specifically include the processing of individual complaints through a class action claim. Pursuant to the rule, if no class-based bias is found, the individual claims included in the class complaint should be processed as individual complaints, the court said, citing 29 C.F.R. Section 1614.204(l)(2).

Sufficient Notice Provided. The court rejected the Postal Service's argument that the class complaint did not provide sufficient notice to the agency that individual claims were contemplated. By setting forth the information required to allege that they were proper representatives of a potential class, the plaintiffs were necessarily required to set forth the information on their individual claims, the court said.

Allowing the individual claims to satisfy the administrative exhaustion requirement through the class complaint promotes administrative and judicial efficiency, it added.

On the other hand, the appeals court agreed with the trial court that the plaintiffs had failed to meet the class certification requirements of Federal Rule of Administrative Procedure 23.

No common facts demonstrating a discriminatory pattern or practice or disparate impact were alleged in the complaint, the court said. The only common assertion is a general allegation that USPS failed to comply with Title VII, the court said.

Judges John C. Porfilio and Terrence L. O'Brien joined in the opinion.

David C. Warren of Warren & Boonin in Boulder, Colo., represented the employees.

Eric D. Miller of the Justice Department in Washington, D.C., represented the agency.

First Amendment

Court Refuses to Enjoin Discipline Of Officers Involved in Motorcycle Gang

Five Connecticut Department of Corrections officers failed to convince a federal trial judge to enjoin the department from disciplining them for being involved in a national motorcycle gang that is reputed to be a major drug trafficker whose members engage in violence, associate with white supremacists, and sell stolen motorcycle parts (*Piscattano v. Murphy,* D. Conn., No. 3:04cv682, 5/14/04).

Judge Mark R. Kravitz of the U.S. District Court for the District of Connecticut denied the plaintiffs' motion for a preliminary injunction pending the litigation of their constitutional claims against the department. The judge noted that there was no evidence that the five plaintiffs, led by Gary Piscattano, had engaged in any criminal activity or that the Waterbury, Conn., branch of the Outlaws Motorcycle Club was up to no good. Instead, as one plaintiff testified, he was a member because they ''rode bikes a lot, went to a lot of events, cookouts, parties, funerals, things like that.''

However, a preliminary injunction was not warranted, the court concluded, because the plaintiffs' First Amendment freedom of association claim was too shaky, given that their association with the Outlaws did not involve matters of public concern. ''[R]iding motorcycles, going to parties, and bonding with friends—important as those activities undoubtedly are to Plaintiffs—simply do not touch upon matters of public concern, as required by the case law,'' the court said.

Links to Biker Gang Investigated. In August 2003, the department began investigating allegations that several correctional officers were members of or associated with the Outlaws. The Outlaws are a rival group to the Hell's Angels Motorcycle Club. Federal racketeering prosecutions against them have been initiated in Florida, Indiana, North Carolina, and Wisconsin, and several members have been convicted of felonies, according to a government report relied upon by the department.

The department interviewed the plaintiffs, all of whom, until that point, had spotless disciplinary records over the course of their careers, which extended from nine to 18.5 years. The evidence also showed they were law-abiding citizens, the court added.

Three of the plaintiffs admitted that they were members of the Outlaws at one time, but claimed to have left the group before the department started its investigation. Those officers were found to have been ''less than truthful'' about having left the group. Ultimately, the department decided to fire them for being members of the group and for being less than truthful.

The department decided the other two plaintiffs never were members but did attend some Outlaw functions. Those workers, who admitted to attending the functions, were issued ''formal counselings'' and were told that any recurrence of the behavior would lead to more severe discipline up to and including termination.

The plaintiffs sued under the Civil Rights Act of 1871 (42 U.S. Code Section 1983) claiming violations of their constitutional rights, including their First Amendment right to freedom of association.

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The employees sought an order enjoining the department from dismissing the three workers found to be less than truthful, rescinding the counseling given to the other two, and ordering the department to refrain from taking any action against the workers for associating with the Outlaws.

Court Reluctantly Assumes Irreparable Harm. To obtain a preliminary injunction, the plaintiffs had to show they would experience irreparable harm without one, and either a likelihood of success on the merits or sufficiently serious questions on the merits making them fair ground for litigation, the court explained.

Reluctantly, the court assumed the plaintiffs established irreparable harm by asserting that being fired or disciplined for associating with the Outlaws chilled their First Amendment associational rights. ''[I]t would appear that under existing precedent, Plaintiffs have made all the showing they must make in order to qualify for a presumption of irreparable harm,'' the court said.

The court added, however, that it was unclear if this presumption of irreparable harm should apply where the associational rights at issue involve a social club or a gang.

''[T]he court doubts that being prevented from attending social events during the pendency of this action is the type of injury that should give rise to a presumption of irreparable harm and that should, therefore, justify a preliminary injunction against state officials in the management of their employee workforce,'' the court said.

No Matters of Public Concern, Court Says. As for the merits of their case, the plaintiffs could show a violation of their First Amendment association rights by showing first that their activities touched on matters of public concern, and second that their interest in the association outweighed the government's interest in efficient public service.

The plaintiffs failed to show that their expressive association was a matter of public concern, the court said. ''All of the plaintiffs testified that their purposes in wanting to associate with the Outlaws were purely social,'' the court said, adding that it did not mean to belittle the value of friendship and fellowship.

The plaintiffs argued that matters of public concern could be found in the Outlaws' messages of acceptance of nonmainstream individuals, of nonconformance to society's rules, and of the values of biking and brotherhood. ''If Plaintiffs' argument were correct, any grouping of people for any purpose would involve a matter of public concern,'' the court said.

Even if the plaintiffs' association with the Outlaws involved matters of public concern, the balancing of the parties' interests tips in favor of the employer, the court found. Given the disruption that could occur in the prison if the Waterbury chapter were to begin engaging in criminal activity—a turn of events expected by the state police and Federal Bureau of Prisons due to the group's rivalry with the Hell's Angels—the department was justified in preventing the future disruption by disciplining the workers, the court said.

However, since no matters of public concern are at issue, the employer's actions pass constitutional muster if there is a rational basis for the actions, the court said, finding that this test was met.

The department ''has sound reasons for not wanting its correctional officers to become members of or associate with groups such as the Outlaws that have been accused of criminal activity on a national basis and are known to have longstanding feuds with other groups that are present in the prison population, such as the Hell's Angels,'' the court said.

The court noted that the plaintiffs might be about to present viable claims in grievance proceedings initiated by their union. Several of them asked their supervisors about their association with the Outlaws, and were told it was not a problem so long as they did not engage in criminal activities. Also there was some evidence that they received more severe discipline than other correctional officers found to be less than truthful in other contexts. That evidence, however, was not at issue here, the court said.

Kathleen Eldergill of Beck & Eldergill in Manchester, Conn., represented the plaintiffs.

Mark P. Kindall of the state attorney general's office in Hartford, Conn., represented the agency.

Privacy

IG's Report Shielded by Executive Privilege, Not Available to Plaintiff During Discovery

A sexual harassment plaintiff who sought access to investigative files backing up a Pennsylvania inspector general's report on harassment within the Pennsylvania State Police may not obtain that information in discovery because it is shielded by executive privilege, a federal district court has decided (*Haber v. Evans*, E.D. Pa., No. 03-CV-3376, 5/4/04).

Granting the inspector general's motion to quash a subpoena, the U.S. District Court for the Eastern District of Pennsylvania ruled that the IG's interest in maintaining the confidentiality of government sources, its subjective analyses, and other material underlying its public report on the state police's history of harassment outweighed plaintiff Ashley Haber's need for the information. Among other factors, the court observed that the IG's public report provides a road map for discovery for Haber, who is free to question under oath individuals named in that report.

Judge Cynthia M. Rufe said that enforcing the plaintiff's subpoena in this case could interfere with the IG's function by discouraging public officials and others from talking candidly in private about matters under investigation.

''While the investigative materials in the OIG file may assist [Haber] in proving her case, the subpoena is essentially an attempt to use the Inspector General as her own liability expert,'' the court said. ''Although the investigation was funded with taxpayer dollars, the OIG undertook the investigation to improve PSP [Pennsylvania State Police] policies and programs that serve the general public, even though individual lawsuits are pending. Moreover, [Haber] seeks monetary damages only in this case. She has not requested any injunctive relief against the PSP, and she should not be permitted to prosecute this civil action at the taxpayers' expense.''

IG Report Documented Harassment. In June 2003, after disclosure of detailed charges of sexual harassment and sexual misconduct by members of the state police, the Pennsylvania Office of Inspector General (OIG) began an investigation to establish the groundwork for making operational changes and improvements within the PSP and preventing and deterring future incidents of harassment.

The OIG probe included a review of sexual harassment complaints filed with the PSP Bureau of Professional Responsibility (BPR) from 1995 through 2003, administrative regulations, and pleadings and discovery in the unpublished opinion in *Maslow v. Evans* (E.D. Pa. 11/7/03), a lawsuit under 42 U.S. Code Section 1983 seeking to hold various PSP supervisors liable as a result of the criminal misconduct of former state trooper Michael Evans. The inspector general also interviewed PSP personnel, a representative from the governor's office, and subjects, complainants, and witnesses in cases in which PSP had investigated charges of sexual harassment or misconduct. The OIG investigation generated various reports, flow charts, and memoranda, according to the court.

In September 2003, the OIG issued a public report criticizing PSP policies and acknowledging a ''voluminous record of unsavory behavior'' by some PSP members. The inspector general recommended creating a commission to investigate sexual misconduct in law enforcement as well as the following steps: requiring all PSP members to report alleged sexual misconduct directly to BPR; prohibiting supervisors from investigating charges of direct subordinate misconduct; requiring complete documentation of all BPR investigative interviews; providing information on all prior misconduct cases to new supervisors when state troopers are transferred; and improved training for background investigators.

Haber, a sexual harassment plaintiff in a pending civil suit against the PSP, served a subpoena on the inspector general, seeking numerous documents relied upon to prepare the September 2003 report. Inspector General Donald L. Patterson resisted disclosure, asserting that the entire investigative file is shielded either by executive privilege, the deliberative process privilege, the self-critical analysis privilege, or the law enforcement-investigative privilege. Patterson asked the district court to quash the subpoena.

Executive Privilege Sustained. In seeking to enforce the subpoena, Haber argued that the investigative documents the inspector general relied upon to prepare his September 2003 are not absolutely privileged and that discovery is especially important in this case because it concerns the conduct of public officials. She contended that the OIG investigative file is clearly relevant to her legal claims, that other courts have required production of similar files despite claims of privilege, and that without the file, it would be extremely difficult for her to prove that PSP policymakers had knowledge of and condoned instances of sexual harassment.

Executive privilege shields '' 'internal communications offering opinions and recommendations' in order to 'safeguard free expression in giving intragovernmental advice by eliminating the possibility of outside examination as an inhibiting factor,' '' Judge Rufe wrote. ''However, the privilege is not absolute, and should be upheld only if damage to the executive department or the public interest outweighs the harm to the plaintiff from non-disclosure.''

Citing *Frankhauser v. Rizzo*, 59 F.R.D. 339 (E.D. Pa. 1973), the court evaluated the OIG's executive privilege argument by considering the 10 factors listed in *Frankhauser*. Among those factors are whether disclosure would thwart government processes by discouraging citizens or public officials from providing information and whether a party has alternative means for obtaining the information sought in a subpoena, the court noted.

In this case, the court said, seven of the 10 *Frankhauser* factors tilt in favor of nondisclosure. Haber failed to show that the relevant information in the investigative files could not be obtained through other means, the court added.

''There is no indication that any of the OIG's witnesses are deceased or unavailable or that any of the information contained in the investigative files is not otherwise available to plaintiff,'' Rufe wrote. ''Moreover, requiring [Haber] to obtain PSP records, including personnel files, directly from the PSP gives the [state police] records custodian the opportunity to object to the release of files containing confidential information.''

The court concluded that executive privilege covers the OIG's investigative files and evaluative materials and that Haber had failed to demonstrate an overwhelming need requiring the court to override the privilege.

''Confidentiality is vital to OIG investigations because it protects government sources, encourages candor, and enhances the effectiveness of investigative techniques and procedures,'' Rufe wrote. ''Due to the voluminous records already in [Haber's] possession as well as her ability to question each of the high-ranking PSP officials under oath through the discovery process, the court quashes the subpoena on the basis of executive privilege.''

Thomas W. Sheridan of Sheridan & Murray in Philadelphia represented Haber.

Sue A. Unger of the state attorney general's office and Gene M. Linkmeyer and James P. Golden of Hamburg & Golden, all of Philadelphia, represented the defendants.

Sexual Harassment/Retaliation

Partial Dismissal of Section 1983 Lawsuit Advised on Harassment, Retaliation by DA

A former county employee's equal protection claim against the district attorney for alleged sexual harassment should be dismissed, but the plaintiff may proceed with a retaliation claim under 42 U.S. Code Section 1983, a magistrate judge in the U.S. District Court for the District of Maine has decided (*Denning v. Povich*, D. Me., No. 04-04-B-H, 5/3/04).

Recommending partial dismissal of the lawsuit, Magistrate Judge David M. Cohen recommended that plaintiff Tammy Denning not be allowed to proceed with her sexual harassment claim against defendant Michael Povich in his official capacity either because Maine law classifies the district attorney as a state official or because Denning failed to allege a county policy or custom of sexual harassment.

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Under the 11th Amendment, state officials in their official capacity are not subject to lawsuits for damages for alleged constitutional violations under Section 1983, the court explained. A Maine statute provides that ''all district attorneys . . . are full-time officers of the state.'' Denning argued that Povich, the elected district attorney for Hancock and Washington counties, was nevertheless a county official subject to suit under Section 1983. (She declined to name the county as a defendant.) Denning relied on two Maine state court rulings that district attorneys enjoy absolute immunity from Section 1983 lawsuits only for actions taken in their role as prosecutors.

No Need to Resolve Immunity Issue. Cohen wrote that although he was inclined to agree with Povich that the defendant is a state official immune for purposes of the Section 1983 claims asserted by Denning, it was unnecessary to resolve that issue in order to dismiss Denning's sexual harassment claim.

''If [Povich] is a state official, he clearly cannot be sued in federal court in his official capacity under section 1983,'' the court said. ''If the defendant is a county official, any claim against him in his official capacity is a claim against the county. The county may only be sued under section 1983 in an official capacity action when the plaintiff alleges that a policy or custom of the county played a part in the violation of federal law. The complaint in this action cannot reasonably be read to allege the existence of any such policy or custom. The defendant is accordingly entitled to dismissal of all claims asserted against him in his official capacity.''

The court added, however, that Denning should be allowed to proceed on her second Section 1983 claim, which alleged that Povich retaliated against her for protected speech (her grievance filed with the county board of commissioners) by making it difficult for her to transfer to another county job and then ensuring that her work life was miserable after she did transfer. Denning alleged that her resignation in January 2003 was a constructive discharge.

Denning may proceed with her First Amendment retaliation claim against Povich in his individual capacity, the magistrate recommended. Although the court observed that Denning's sexual harassment claim alone is not necessarily ''speech on a matter of public concern,'' it said her additional complaint that Povich routinely referred to women as ''bitches'' and ''whores'' is a matter of public concern. The plaintiff's allegation that Povich played a role in her constructive discharge meets the ''adverse action'' requirement for First Amendment retaliation and the district attorney failed to show that he enjoys qualified immunity from the Section 1983 retaliation claim as a matter of law, the court added.

''A reasonable lawyer serving as a district attorney would have known in 2002 and 2003 that retaliation for a public employee's exercise of her right to free speech was not protected by the Constitution and that some internal grievances are protected by the First Amendment,'' Cohen wrote.

Alleged Harassment by Supervisor. Denning was hired in December 1999 to work as a victim witness advocate in the Hancock County district attorney's office, where Povich was her direct supervisor. Denning alleged that during her employment, Povich made several sexually suggestive comments to her and also repeatedly referred to female crime victims as ''bitches'' or ''whores.''

In March 2002, Denning filed a grievance regarding Povich's alleged conduct. The county board of commissioners upheld the grievance and offered to find Denning another job. Denning alleged that in retaliation for her grievance, Povich worked to defeat her reassignment to another county job. After she secured a transfer, she alleged, Povich ''made her working life quite difficult,'' causing her constructive discharge in January 2003.

Denning sued Povich for injunctive relief and damages under Section 1983, alleging that he had violated her constitutional rights through sexual harassment in violation of the 14th Amendment equal protection clause and retaliation for First Amendment protected speech. She did not name the county as a defendant. Povich moved to dismiss both counts.

First Amendment Claim Proceeds. As an initial matter, the court said, Denning's request for injunctive relief should be dismissed, since she is neither seeking reinstatement nor alleging wrongful conduct toward any county employees other than herself. That leaves Denning's Section 1983 claims for compensatory and punitive damages against Povich in his individual and official capacities, the court noted.

The official capacity claims should also be dismissed, the court said, either because Povich is a ''state official'' immune from damages claims under Section 1983 or because he is a county official and Denning alleges no county policy or custom of sexual harassment or retaliation.

Povich argued that the First Amendment retaliation claim against him in his individual capacity should likewise be dismissed. The defendant claimed that Denning failed to allege a valid First Amendment claim either because her grievance to the county board was not speech on a ''matter of public concern'' or because Povich's alleged obstruction of her transfer efforts and interference in her subsequent job was not ''adverse action'' sufficient for a retaliation claim.

'Matter of Public Concern.' Rejecting the defendant's argument, the court observed that in addition to alleging a personal sexual harassment claim, Denning had complained to the board about Povich's alleged repeated use of sexually offensive terms to refer to female crime victims. ''I conclude that the allegation concerning [Povich's] repeated offensive characterization of female victims does constitute speech on a matter of public concern,'' Cohen wrote.

The court also found that Denning had sufficiently pled ''adverse action,'' given her claim that Povich's alleged conduct after her successful grievance contributed to her constructive discharge. ''While the complaint in this case veers perilously close to expressing this element of the retaliation claim as a 'bald assertion,' I conclude that an adverse employment action is adequately pleaded,'' Cohen wrote.

Povich argued that even if Denning adequately alleged a retaliation claim, he enjoys qualified immunity against the Section 1983 claim. He contended that Denning's case is one in which her constitutional right was ''not clearly established'' given that she claims a ''double'' violation—i.e., that Povich did not directly cause her constructive discharge but induced other supervisors to treat Denning so badly she was forced to

resign. Povich added that ''a reasonable district attorney'' would not have known that he ''was acting unconstitutionally by speaking to others, as the plaintiff apparently alleges.''

The court, however, declined to recommend that Denning's retaliation claim must be dismissed because Povich enjoys qualified immunity. Instead, the court suggested that a reasonable district attorney should have been aware that some employee grievances are shielded by the First Amendment and that adverse actions taken thereafter may violate a public employee's constitutional rights.

''It may well be that [Povich] is entitled to summary judgment based on the facts,'' Cohen wrote. ''The facts underlying the defense of qualified immunity are not before the court at this time, however. The only question before the court is whether, based on the allegations in the complaint, [Denning] would not be able to recover under any set of facts due to the defendant's qualified immunity. That question must be answered in the negative.''

Arthur J. Grief and Julie D. Farr of Gilbert & Grief in Bangor, Maine, represented Denning.

Susan P. Herman, assistant state attorney general in Augusta, Maine, represented Povich.

Disabilities Discrimination

Court Rejects Postal Employee's Claims Of Rehab Act Disability Bias, Retaliation

A postal worker with a chronic back condition failed to prove that the Postal Service either discriminated against him based on his disability or retaliated against him in violation of the Rehabilitation Act when it transferred him from a preferred job and placed him in another position modified to fit his physical limitations, a federal trial court has decided (*Trobia v. Henderson*, W.D.N.Y., No. 01-CV-6414-DGL-JWF, 4/26/04).

Following a bench trial on plaintiff David Trobia's claims, the U.S. District Court for the Western District of New York found that Trobia has a disability within the meaning of the Rehabilitation Act, which has standards identical to those under the Americans with Disabilities Act. The court found, however, that Trobia was not a ''qualified'' individual with a disability because he could not perform the essential functions of the ''box section'' job he desired.

In addition, the Postal Service did not discriminate on the basis of disability by removing Trobia from his initial light duty position and it reasonably accommodated his back condition by structuring an alternative job to fit his physical limitations, the court decided.

History of Back Trouble. Trobia has worked in a Rochester, N.Y., post office since 1983, and has experienced back problems since at least 1988. In August 1993, Trobia underwent a posterior lateral spine fusion and was out of work on medical leave until July 1994, when he returned part-time.

Trobia returned to work full-time in September 1994 to the ''box section,'' in a limited duty position that the Postal Service created to fit his post-surgical medical restrictions. In the fall of 1995, Postal Service management began discussions with union representatives about creating several limited duty positions on each shift to assist disabled employees. Trobia's name was mentioned during those discussions, and the employer determined that he would be moved from the box section sometime in the near future.

On Jan. 12, 1996, however, Trobia was summarily removed from the box section after an altercation with a co-worker. Several employees in the section had complained about Trobia to their supervisor and apparently the Jan. 12 incident was the last straw. The Postal Service moved Trobia to a new ''handicapped case'' job pitching mail, where he worked from January 1996 through June 1997. Trobia repeatedly asked the Postal Service to return him to the box section but the service declined to do so.

Trobia ultimately sued under the Rehabilitation Act, claiming that the Postal Service had discriminated based on disability by removing him from the box section, had failed to accommodate his disability, and had retaliated against him for his disability bias complaints.

Judge David G. Larimer presided at a weeklong bench trial on Trobia's claims in November 2003.

Plaintiff Has Disability. As an initial matter, the court found that Trobia has a disability within the meaning of the Rehabilitation Act because his post-surgery back condition substantially limited his ability to lift objects and to sit, stand, or walk for extended periods, as compared to the average person in the general population.

The Postal Service contended that some of Trobia's activities outside the workplace belied his contention that he was substantially limited in major life activities. For example, Trobia conceded that he played golf approximately twice a week and a Postal Service representative saw Trobia sit through a two-hour movie and subsequent dinner of at least one hour. The Postal Service was suspicious enough of Trobia's claims that it placed him under surveillance and produced videotapes that the court received in evidence.

''Despite this conflicting evidence, I find that [Trobia] has presented sufficient evidence that he was disabled within the meaning of the act,'' Judge Larimer wrote. ''It is clear that [Trobia's] physicians, as well as an independent medical examiner, consistently were of the opinion that [Trobia's] abilities to sit, stand, and walk were significantly restricted. I find as a matter of law that, when compared to the average person in the general population, the condition, manner, and duration under which [Trobia] could sit, stand, and walk were significantly restricted.''

The court agreed with the Postal Service, however, that Trobia was not an ''otherwise qualified'' individual with a disability because he could not perform all the essential functions of the box section job.

Trobia's duties in the box section from 1994 through January 1996 included waiting on customers, sitting at a desk doing paperwork on insured mail, renting post office boxes, and distributing or ''sticking'' mail in cases containing customer post boxes.

Trobia was not performing all the essential functions of a box section employee, however, the court found. Rather, he performed ''light'' work, could not lift mailbags in excess of 20 pounds, and did not ''stick'' mail because it might exacerbate his back condition. That the Postal Service allowed Trobia to work in the box section without performing those functions does not mean they were not ''essential,'' the court said. It added

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that the employer should not be punished for allowing Trobia to work in the section despite his inability to perform those essential functions.

Reasonable Accommodation Provided. Trobia argued that the Postal Service violated the statute by requiring him to work in the ''handicapped case'' after his transfer from the box section and by not placing him in another position consistent with his medical restrictions.

The court, however, found that the Postal Service accommodated Trobia's disability by conferring with his doctors, modifying the ''handicapped case'' job to fit his restrictions, and changing aspects of the job after Trobia complained, although perhaps not with the alacrity the plaintiff would have preferred.

''[N]one of the actions by the USPS violated the Act by failing to accommodate or by retaliating for engaging in protected activity,'' Larimer wrote. ''The USPS has met its burden of demonstrating that the accommodations it provided plaintiff were reasonable within the meaning of the Act. The accommodations may not have been to [Trobia's] liking, but they were not inconsistent with his needs and limitations as directed by his physicians. Furthermore, I find that [Trobia] failed to establish that the USPS engaged in retaliation.''

The court found that Trobia was not removed from the box section for discriminatory reasons, but rather for ''legitimate operational reasons'' related to personnel problems that the plaintiff himself acknowledged. ''[T]he fact that Trobia worked in the Box Section for a period of time, although unable to perform the essential functions of that job, did not create any vested rights to continue to do so,'' the court said. ''The USPS should not be punished for being more generous to plaintiff by allowing him to remain in a job that he was unable to perform.''

Tasks Modified in Response to Requests. The employer reasonably accommodated Trobia's work restrictions by placing him in the ''handicapped case'' job, which was specifically designed for employees returning from injury. Trobia argued that the new job worsened his back condition, but the court disagreed. It also noted that, when Trobia complained about new symptoms, the Postal Service modified his tasks.

''Plaintiff decided on his own when to sit, stand, and walk based on his tolerance and pain level,'' the court said. ''With the exception of certain reasonable restrictions as to where plaintiff could walk at the facility during the workday, the USPS did not restrict plaintiff in any manner, concerning his need to take breaks and change positions. Trobia conceded on cross examination that, at the handicapped case, he worked at his own pace and there were no minimum production standards that he had to meet.''

Trobia did not prove any adverse employment actions necessary to maintain a retaliation claim under the act, the court concluded.

Christina A. Agola of Rochester, N.Y., represented Trobia.

Brian M. McCarthy of the U.S. attorney's office in Rochester represented the Postal Service.

Liability

Sheriff's Office May Be Vicariously Liable For Deputy's On-Duty Sex Attack on Citizen

A Vermont county sheriff may be held vicariously liable for a deputy's on-duty sexual assault of a citizen if the victim shows that the deputy was aided in accomplishing the misdeed by his employment relationship, the Vermont Supreme Court has decided in a 3-2 ruling (*Doe v. Forrest,* Vt., No. 2002-184, 5/7/04).

The assault was outside the deputy's scope of employment, and thus under prior law would not give rise to vicarious liability, Justice John A. Dooley said. However, the court agreed with the plaintiff that vicarious liability may nevertheless arise under the principles of the *Restatement (Second) of Agency* Section 219(2)(d) as analyzed in the sexual harassment context in *Faragher v. Boca Raton*, 524 U.S. 775, 77 FEP Cases 14 (1998), and *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 77 FEP Cases 1 (1998). The case was remanded for additional factfinding.

The deputy routinely visited the convenience store where the 20-year-old female plaintiff worked as part of his ''community policing function.'' On one evening visit, after having pulled the woman's head in various directions by grabbing her pony tail, he showed her a picture in an adult magazine of a woman performing fellatio and coerced her to perform oral sex in a secluded area of the store. He later pleaded no contest to charges of lewd and lascivious behavior and neglect of duty, and resigned from his job.

The plaintiff sued the sheriff and the sheriff's department, alleging that they were vicariously liable for her injuries. The trial court granted the defendants summary judgment, finding that they were not vicariously liable under the doctrine of respondeat superior or alternative theories of liability under Section 219(2)(d).

No Apparent Authority. The supreme court affirmed as to respondeat superior liability. The deputy did not act within the scope of his employment as required by that doctrine, the court said, because his misconduct was ''rooted in prurient self-interest'' and not by a purpose to serve the county sheriff.

But the court reversed and remanded on the Section 219(2)(d) theory. Under that formulation, a master may be liable for the torts of a servant acting outside the scope of his employment if ''the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.'' The plaintiff asserted liability under both prongs of this disjunctive provision.

The court quickly dispatched the ''apparent authority'' theory. Apparent authority generally relates to an agent's purporting to exercise a power that the agent does not have, rather than to threatened misuse of actual power, but the existence of apparent authority depends on the plaintiff's showing that she relied on the agent's misrepresentation because of some misleading conduct by the principal, the court said. There was no evidence that the sheriff's department communicated or manifested the deputy's authority to engage in sexual misconduct on duty, it said. To hold that providing the deputy with a gun, badge, and uniform created appar-

ent authority ''would necessarily mean that all law enforcement officers have the apparent authority to engage in sexual misconduct,'' the court reasoned.

Aid in Accomplishment. A triable issue exists, however, as to whether the deputy was aided in accomplishing the tort by his job, the court ruled. It cited *Faragher* and *Ellerth* for the proposition that this prong of Section 219(2)(d) is a distinct basis of liability from, rather than merely ''refining,'' the apparent authority prong, and is triggered, in the words of *Faragher*, when ''tortious conduct is made possible or facilitated by the existence of the actual agency relationship.''

According to the state court, *Faragher* ''emphasized three main considerations in applying § 219(2)(d) in the supervisor-employee relationship: the opportunity for contact created by the relationship; the powerlessness of the employee to resist the supervisor and prevent the unwanted contact; and the opportunity to prevent and guard against the conduct.'' Parallel factors support applying the provision in this case, the court said.

Law enforcement officers have ''unique access'' to citizens depending upon them for protection, particularly under modern community policing practices, the court said. They also have ''extraordinary power'' over citizens, and when the law enforcement officer is the wrongdoer, the citizen ''is also stripped of the official protection that society provides,'' becoming ''particularly vulnerable and defenseless.'' In addition, local governments and supervisory officials have a greater opportunity to guard against officers' misconduct.

''No incentive to prevent this kind of conduct is created by leaving the victim uncompensated,'' the court said. ''Nor do we think we create an adequate incentive by requiring a plaintiff to prove that the employer inadequately supervised the officer.''

Gained Access Through Position. Here, the court ruled, a jury could reasonably have found that the deputy gained access to the plaintiff when she was alone in the store by virtue of his position in using it to make inquiries about her work schedule, and in leaving his cruiser parked in front of the store with its lights on, which could have deterred others from entering. The plaintiff's testimony that the deputy had told her on the day of the assault that, if he ever used his gun, he would shoot to kill, also supported her case. On the other hand, her testimony that she did not know why else she may have been intimidated by the deputy, such as his wearing a uniform, indicated a disputed issue of fact as to her state of mind, the court said, reversing the summary judgment and remanding.

Dissenting, Justice Marilyn S. Skoglund, joined by Chief Justice Jeffrey L. Amestoy, argued that the court's ''broad application'' of Section 219(2)(d)'s second prong ''has created a threat of vicarious liability that knows no borders'' and could sweep in other employees such as teachers, physicians, and probation and correctional officers.

David Putter of Montpelier, Vt., represented the plaintiff.

Pietro J. Lynn of Burlington, Vt., represented the defendants.

Full text of the opinion is available at http://pub.bna.com/lw/2002184.htm.

Case Notes

Discharge

Merit Systems Protection Board did not err when it (1) rejected General Services Administration employee's petition for review of its administrative judge's findings that she had committed offense for which she had been removed and that she had not sustained her asserted affirmative defenses of, among other things, racial discrimination and retaliation for previous participation in EEO process, and (2) granted GSA's petition for review of judge's mitigation of her penalty to suspension without pay and then sustained her removal, even though judge found that GSA had failed to prove two of three specifications that it had cited to support charge of insubordination against her, since proof of one—but not all—specifications is sufficient to sustain charge, substantial evidence supports finding that she had been insubordinate, and deciding official considered her medical condition and positive attributes in concluding that her continued disruptive behavior warranted her removal (*Murry v. GSA*, 92 FEP Cases 1288, Fed. Cir., No. 03-3297, 5/5/04).

Pre-Employment Inquiries

Factual issue exists as to whether applicant for temporary position with U.S. Postal Service had been offered job at pre-hire session attended by approximately 50 other applicants, where human resource specialist who conducted session and applicant differ as to what was said at session, and documents that she completed during session referred to her variously as ''applicant,'' someone ''qualified for employment consideration,'' and ''new hire'' (*Brady v. Potter*, 15 AD Cases 916, D. Minn., No. 02-1121 (DWF/SRN), 4/30/04).

Due Process

Post-termination remedies, no matter how elaborate, do not relieve city of its obligation to provide minimal pre-termination due process, and discharged police officer stated 14th Amendment claim under 42 U.S. Code Section 1983, where city concedes that it acted under color of state law and that officer possessed protected property interest in his job, and officer's telephone conversations with deputy chief and chief—in which he first learned that city would not let him return from long-term disability leave and that his rank had been ''done away with''—occurred after effective date of his termination and provided neither summary of city's reasons for terminating him nor opportunity to respond (*Montgomery v. City of Ardmore*, 21 IER Cases 289, 10th Cir., No. 01-7154, 4/28/04).

Contracts

Professor failed to prove that there was inadequate cause to dismiss her for disclosing confidential information about student to classmates, substantial neglect of duty in ending class one month early without authorization, and persistent pattern of unprofessional and inappropriate behavior toward students (*Peterson v. North Dakota Univ. Sys.*, 21 IER Cases 241, N.D., No. 20030249, 4/13/04).

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Supreme Court

Affirmative Action

Justices Let Stand Application of School Admissions Rule to Chicago Police Exam

The U.S. Supreme Court has denied review of a federal appeals court decision that applied the justices' affirmative action standards announced in cases involving the University of Michigan's admissions policies to a Chicago Police Department promotional examination (*Petit v. Chicago,* U.S., No. 03-1458, *cert. denied* 6/1/04).

The case involved a sergeant promotion examination that was administered in 1985 and 1986 which was ''standardized'' to account for race and ethnicity.

The U.S. Court of Appeals for the Seventh Circuit applied the affirmative action standards announced by the Supreme Court in the University of Michigan admissions cases of *Grutter v. Bollinger*, 539 U.S. 306, 91 FEP Cases 1761 (2003) and *Gratz v. Bollinger*, 539 U.S. 244, 91 FEP Cases 1803 (2003) (41 GERR 697, 7/8/03), and ruled that the department's racial and ethnic standardizing measures do not violate the Equal Protection Clause of the U.S. Constitution (352 F.2d 1111 (7th Cir. 2003)) (41 GERR 1264, 12/30/03).

New Affirmative Action Standard. The appeals court examined the department's promotion examination under the *Grutter*/*Gratz* rulings in which the Supreme Court held that student body diversity is a compelling state interest, but rejected an inflexible admissions process that assigned each minority applicant 20 extra points in their admissions score (41 GERR 697, 7/8/03).

The Seventh Circuit noted the Supreme Court's reliance on the testimony of business and military leaders on the need for workplace diversity as a basis to find diversity a compelling higher education interest. The appeals court emphasized that experts agreed that police force diversity is critical to ensure effective policing and cited its holding in another Chicago Police Department case that police staffing affirmative action is a compelling government interest (*Reynolds v. Chicago*, 296 F.3d 524, 90 FEP Cases 69 (7th Cir. 2002) (41 GERR 707, 7/16/02)).

The appeals court found that the process used to take into account potentially biased examination questions so that the score of minority test-takers was increased was not a prohibited across-the-board addition to the final score, but rather an acceptable equalization factor. The court also noted that the standardizing process was only applied on the 1985-1986 test, and therefore was of limited duration.

Petition for Review. In their petition for Supreme Court review, the employees argued that the appeals court erred in extending the *Grutter*/*Gratz* school admissions rulings to race-based career promotions. Even if those standards are applied, the petitioners continued, the appeals court erred in failing to recognize that the city had applied ''mechanical quotas'' and had not given individualized consideration to applicants as required by *Grutter*/*Gratz*.

The petitioners also said that the use of the standardizing process could not fairly be called temporary since it supported 20 years of prior quotas. They also noted that race preferences violated the relevant collective bargaining agreement, which barred the use of race and ethnic origin in employment decisions.

The department waived its right to respond to the petition for review.

Kimberly A. Sutherland of Chicago represented the employees.

Benna R. Solomon of the city law department in Chicago represented the city.

John H. Findley of the Pacific Legal Foundation in Sacramento, Calif., filed a friend-of-the-court brief in support of the petition for review.

Summary of Selected Employment Case Denied Review June 1, 2004

Retaliation—Due Process.

03-1409 *Burkhardt v. Oklahoma*

Ruling below (Okla. Ct. Civ. App., 7/22/03, *unpublished opinion*):

Trial court's affirmance of state Merit Protection Commission's decisions dismissing employee's appeals from state agency's rejection of her internal grievance and agency's decision to treat employee's angry telephone call as resignation, is affirmed; when trial court acts as appellate court in reviewing administrative order, absence of specific findings of fact and conclusions of law in trial court's order does not constitute reversible error; substantial evidence supports basis—harassment of co-workers and supervisor—for employee's suspension, conclusion that employee resigned on morning that she angrily called supervisors to say that she had ''quit playing ball'' and that agency could find another ''flunk[y] to pick on,'' and MPC's determination that negative performance evaluation, agency's proposed suspension of employee, and its refusal to accept her retraction of resignation were not, as employee contended, retaliatory; employee's claim that she suffered irreparable prejudice because of employer's refusal to allow her to review her entire personnel file, including unofficial records maintained by her supervisors, is unpersuasive, given that she failed to request access to them prior to filing her appeal to MPC and made no showing that there was evidence in such records to support her contentions.

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Electronic Resources

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THIS WEEK'S ISSUE

Listed below are the headlines and page numbers of selected articles in this issue followed by World Wide Web sites providing related information. The links provided by BNA are to external Web sites maintained by federal or state organizations in the U.S., foreign or international governing bodies, or nongovernmental organizations of interest to our subscribers. BNA has no control over their content, timeliness, or availability.

Forest Service Officials Tell Congress They Felt Pressure to Meet A-76 Goals (p. 542)
http://appropriations.house.gov/_files/ForestServiceCompSourcingReport.pdf

Office of Special Counsel Warns AFGE That Voter Registration Violates Hatch Act (p. 545)
http://www.osc.gov/documents/hatchact/federal/fha-31.pdf

OMB Releases Third Set of FAIR Act Lists; 130,000 FTEs Are Outsourcing Candidates (p. 542)
http://www.gpoaccess.gov/fr/index.html

NAPA Seeks Governmentwide Pay-for-Performance (p. 549)
http://www.napawash.org/Pubs/Broadbanding5-04.pdf

NPS Retirees Say Job Vacancies Hurt Parks; Visitor Needs Being Met, Park Service Says (p. 548)
http://www.protectamericaslands.org/documents/psurvey_complete.pdf

DOD Revises Non-Foreign Overseas Per Diem (p. 549)
http://www.dtic.mil/perdiem/pdrates.html

Census State, Local Job Market Statistics Now Online (p. 551)
http://lehd.dsd.census.gov/led/01/index.html

Sheriff's Office May Be Vicariously Liable for Deputy's On-Duty Sex Attack on Citizen (p. 559)
http://pub.bna.com/lw/2002184.htm

INTERNET SOURCES

Listed below are the addresses of World Wide Web sites consulted by editors of BNA's Government Employee Relations Report and also WWW sites for official government information.

American Federation of Government Employees
http://www.afge.org

American Federation of State, County and Municipal Employees
http://www.afscme.org

National Association of Government Employees
http://www.nage.org

National Air Traffic Controllers Association
http://www.natca.org

National Federation of Federal Employees
http://www.nffe.org

National Treasury Employees Union
http://www.nteu.org

Office of Personnel Management
http://www.opm.gov

Office of Special Counsel
http://www.osc.gov

Professional Airways Systems Specialists
http://www.passnational.org

Service Employees International Union
http://www.seiu.org

Society of Federal Labor & Employee Relations Professionals
http://www.sflerp.org

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Government Employee Relations Report
http://www.bna.com/products/labor/gerr.htm

Government Employee Relations Report—Index-Summary
http://www.bna.com/current/ger

Daily Labor Report
http://www.bna.com/products/labor/dlr.htm

BNA's Employment Discrimination Report
http://www.bna.com/products/lit/edr.htm

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