

Labor News & Views

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HAVE AN AFFAIR? GET FIRED.

I am certain you will not find this in your Harlequin romance novel but you will find the case in the decisions of the Court of Appeals for the Federal Circuit. He was a Program Manager at the base's Morale, Welfare and Recreation Department (MWR). She was the wife of a Marine in a unit stationed at the base. They met and had an affair. If you really think your private life is private, think again because the rumor mill was alive and well at this base and management found out. Imagine the employee's surprise when he was removed for an "improper personal conduct having an adverse effect on the efficiency of the service."

I can hear you now. "That's off duty conduct and what I do on my own time is my own business." Well, it's not quite that easy. Losing his case before the Merit Systems Protection Board, the Program Manager went to the Court of Appeals for the Federal Circuit who upheld the removal. Yep, this person isn't working for us anymore.

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Quiz Time

As a Division Head, you have come to the conclusion that cost and efficiency considerations require that certain functions now being performed by your employees be contracted out. The plan you have in mind will affect the jobs of about 50 employees. Before implementing your decision, you hear that the union is preparing to fight the contracting out in order to save the jobs of its members.

1. Do you have any obligation to the union prior to executing the contract for outside services?
 - a. Yes, but only regarding the implementation of the contract and its impact on employees, as the actual decision is a management prerogative.
 - b. No, because the decision to contract out is a management prerogative.
 - c. No, because there will be no impact on employees until after the outside services contract is finalized and implemented.
2. Can the union prevent you from contracting out the work in question?
 - a. Yes, because implementation of a decision to contract out cannot be accomplished until union agreement is obtained.
 - b. No, because the decision to contract out is a management prerogative.

c. No, but it is necessary to provide the union with an opportunity to negotiate regarding any potential adverse impact on employees.

3. When negotiating a new collective bargaining agreement with your activity, the union submits a demand that, "as of the date of this agreement, no employee will be disciplined (including removal from Government service) unless both the union and management agree that the proposed disciplinary action is appropriate." As a management negotiator, what should your response be to this demand?

a. I would consider the demand, but would not agree unless the union granted substantial concessions to management.

b. I would agree because of the administrative difficulties of grievances and third

c. I would not consider the demand because 5 USC 7106 prohibits negotiating on this subject.

See "Management Rights," Page 3

**Happy Holidays
from all of us
at the HRSC-NW**



HAVE AN AFFAIR? GET FIRED.

(CONTINUED FROM PAGE 1)

Do you remember our previous articles that talked about "nexus?" In layman's term that is the connection between the conduct and efficiency of the service. The Court found that there was a nexus between the conduct and the efficiency of the service because this employee worked as program manager for MWR. In short, he had responsibility for providing support to Marine families, including the families of Marines deployed overseas. Unfortunately his relationship was with the wife of a Marine who was deployed overseas.

The court noted that the misconduct was "private in nature" and "did not affect (the employee's) official responsibilities in any direct and obvious way." In spite of this, the court concluded that the employee's misconduct was inconsistent with the mission and undermined confidence in the employee by his supervisors.

Now, don't gather around the water cooler and devise a plan to get rid of other individuals who may not share your morals. I'm writing this article because it is an extreme case that will grab your attention that your business becomes the Navy's business when there is a conflict between your private life and the work you perform for the Department of the Navy.

FAMILY MEDICAL LEAVE ACT

I know you love it when I talk about leave. It's one of my favorite subjects (yeah, right!). It is good to keep reminding you about leave administration since it's something you do every day as a supervisor.

A good knowledge of the Family Medical Leave Act of 1993 benefits everyone. I thought it might be good to look at some recent cases decided by the Merit Systems Protection Board (MSPB) and US Court of Appeals, Federal Circuit. I'll try to provide the general concepts as a sort of lessons learned.

An employee must first be eligible for FMLA. In general, to be eligible for 12 weeks of FMLA, an employee must have completed at least 12 months of service. MSPB has found that "hours worked" does not include time paid but not "worked" (paid vacation, personal or sick leave, holidays), nor does it include unpaid leave (of any kind) or periods of layoff.

An employee must give the agency proper notice. When the need for leave is foreseeable, an employee must generally provide 30-calendar days' notice. When the need is unforeseeable, such

as a medical emergency, the employee must provide notice within a "reasonable period of time appropriate to the circumstances involve." Only under limited circumstances may the employee retroactively invoke an entitlement to leave. MSPB has held that an employee is not required to *explicitly* invoke FMLA in requesting FMLA leave. It is sufficient that the employee make you aware of circumstances that would warrant leave under FMLA.

The agency must provide the employee with FMLA guidance. When an employee requests leave under FMLA, you are required to provide the employee with guidance concerning the employee's rights and obligations under FMLA. This is contained in the regulation itself, not just a local policy or an agreement with the Union. If you fail to do so, and the employee ends up resigning because they felt they had no other option, then the employee may later claim that the resignation was coerced.

The employee must provide medical certification, if the agency requests it. You may request that an employee provide medical certification for FMLA leave. The employee generally must provide the certification within 15 calendar days of this request. There is a form which has been developed by the Department of Labor which asks the kinds of questions that is relevant to an FMLA request. The form may be found at. www.dol.gov/esa/regs/compliance/whd/fmla/wh380.pdf.

Is the medical certification substantive? It is the employee's responsibility to meet the requirements of 5 USC § 6383(b). You have not obligation if the medical certification fails to state the probable duration of the employee's condition or the date the condition began, nor did they provide relevant facts about the condition.

Is the medical certification timely? In requesting FMLA the medical certification must be submitted timely. MSPB has found that although the employee submitted certification that he had a serious illness on the days in question, he did not

provide the certification within the applicable time period.

What is a "serious health condition"? Although childbirth is the most well-known of the situations prompting the need for FMLA, situations that end up in dispute often involve a serious health condition of an employee or an employee's family member. A serious health conditions an illness, injury, impairment, or physical or mental condition that involves any one of several situations, including inpatient care or continuing treatment by a health care provider.

Here are a couple of cases: In an early case, MSPB found an employee did not establish his daughter had a serious medical condition. Although she had suffered from bronchitis and other illnesses, the medical reports did not show her illnesses involved inpatient care or continuous treatment by a health care provider for the period of the employee's absence.

Looking at the other side of the coin, the Board found that an employee's depression was found to be a serious health condition that rendered her unable to perform the functions of her position during the absence in question.

Confused? I don't blame you. Seems every time I try to talk about leave it becomes more confusing. That is what your HR advisor is there for. Give them a call and talk about your particular situation.

MANAGEMENT RIGHTS

This is a series of quiz articles covering basic entitlements under the Federal Labor Management Relations Statute (5 USC 71). This article is 5 of 10.

Under the law, certain "management rights" exist, about which the parties (union and management) are forbidden to negotiate, regardless of the

language in the negotiated agreement. 5 USC 7106 reserves to management the right to:

- determine the mission, budget, organization, number of employees, and internal security practices of the agency;
- hire, direct, layoff, and retain employees;
- suspend, remove, reduce in grade or pay, or discipline employees;
- assign work, make determinations with respect to contracting out, and determine the personnel by which operations will be conducted;
- select and appoint employees from appropriate sources; and
- take necessary emergency action.

Any decision to act in these areas is a sole prerogative of management. Now the quirk in all this is that both procedures for exercising that authority and arrangements regarding affected employees are subject to negotiations. We commonly call that "Impact and Implementation" (I&I) bargaining.

Management has the unilateral right to make determinations with respect to contracting out. Believe me, this is a strong statement but as it is stated it is true. If management has determined that contracting out is necessary, it can be done. However (you know this was coming, didn't you?) as a management official you have a responsibility to provide the union with an opportunity to negotiate prior to implementation on any such decision which has a potential adverse impact on employees. Some of you have negotiated agreements that talk about this very issue so you may want to pull it out and take a look at that. The correct answer to question 1 is "a".

The union cannot prevent the contracting out from occurring. However, the union must be given an

opportunity to negotiate with respect to impact of the contracting out on unit employees. If you have not reached an agreement the contracting out may be delayed if the union invokes impasse. Impasse is a part of the negotiating process that you should include in your planning. The correct answer to question 2 is "c".

The Statute does not permit negotiations on management's right to suspend, demote, discharge or discipline employees. The correct answer to question 3 is "c"

Next Issue "Negotiated Grievance Procedure"

Got Ideas? You can contact us at nwlaboer_nw@nw.hroc.navy.mil. We would enjoy hearing your ideas for our newsletter.



OTHER HELPFUL RESOURCES

Past Issues of Labor News and Views

www.donhr.navy.mil/HRSC/NewsItem.asp?ItemID=67&ItemArea=5

General Human Resources information:

<http://www.donhr.navy.mil/Employees/cpp.asp>

Training information:

www.donhr.navy.mil/Employees/training.asp

THIS NEWSLETTER IS INTENDED TO PROVIDE GENERAL INFORMATION ABOUT THE MATTERS DISCUSSED. THEY ARE NOT LEGAL ADVICE OR LEGAL OPINIONS ON ANY SPECIFIC MATTERS. FOR FURTHER INFORMATION REFER TO YOUR HUMAN RESOURCES ADVISOR.

Training Opportunity for Northwest Supervisors: Labor Relations for Supervisors

What: This course is designed to provide supervisors and managers an overview of labor relations in the federal sector. Upon completion you will have a basic concept of what labor relations means; the rights of management, employees and union; union representation; what's an unfair labor practice; administering the collective bargaining agreement; and the basics of the grievance procedures and arbitration. **Cost:** Free. **When:** January 28-30, 2003, 0800 – 1600 hours. **Who:** Managers and supervisors with bargaining units. **Where:** Jackson Park, Bremerton Washington. **How:** To register contact your training coordinator or go to <http://www.donhr.navy.mil/Employees/training->

MIRROR-IMAGE MENTORING

Employees succeed for a number of reasons; ability, experience and skill all play a part. But, these factors do not always explain the difference between a good employee and a great one. Sometimes the difference is a good mentor.

Mentoring can be a valuable retention tool and a critical element in employee development. Effective mentoring, however, usually requires the development of a personal relationship between the mentor and the mentee. Good mentors become emotionally committed to their mentees' success. As a result, their relationship cannot be strictly professional.

But if the modern-day avalanche of harassment and discrimination claims have taught us anything, it is that introducing personal feelings and relationships into the business environment is not free of legal risk.

Given the difficulty most employers have in attracting and retaining good employees, the risks of a formal mentoring program are almost certainly worthwhile. As a result, the question for many employers will not be whether to mentor, but how to mentor.

Fear of harassment is not the only factor that impedes mentoring; fear of engaging in conversations that deal with an employee's race, religion or other EEO factors also plays a part. A woman of color clearly faces different obstacles in the workplace than a white man. For a white man to effectively mentor a woman of color, both must be able to discuss these obstacles. These discussions can be productive and both the mentor and the mentee can learn from each other – but only as long as the relationship works.

To encourage mentoring across racial, ethnic, gender and other EEO lines, companies should establish formal mentoring programs. These programs should be in addition to, not in lieu of, the informal mentoring that will occur naturally.

Mentors should not be matched with mentees solely because they share certain similarities. While factors such as gender, race or national origin may affect some of the experiences and perspectives relevant to mentoring, it would be discriminatorily stereotypic to assume that two employees share common values or goals simply because they share the same traits. There is as much diversity among individuals within EEO groups as there is among the groups themselves. Mentoring across racial, ethnic, gender and other lines sensitizes senior managers to the ways that these factors play a role in the workplace, albeit often unconsciously. With greater awareness, mentors can strive for great inclusion. By contrast, mirror-image-mentoring limits how much mentors can learn about the role EEO factors play in the workplace, thereby limiting their growth in this area.

Some individuals are born mentors. For others, it is an acquired skill. Either way, all mentors benefit from training that is focused on interpersonal skills that are critical to the mentoring relationship. Mentors know they cannot shape their mentees in their own image, however, gifted mentors try to cultivate a mentee's own gifts, no matter how different they may be from their own.

Individuals who have mentors are more likely to be successful in overcoming obstacles and, therefore, more productive. They also are more likely to be loyal and less likely to be enticed by the entreaties of a competitor.

Department of the Navy Forum Held 26 August 2002 at the 24th Annual Blacks in Government National Training Conference held in Atlanta, Georgia.

Article Resource SHRM (Society for Human Resource Management)

Submitted by Vanne Johnson

NOVEMBER IS NATIONAL AMERICAN INDIAN HERITAGE MONTH

DISABILITY NEWS:

October was Disability Employment Awareness Month. In the last 18 months, many initiatives and regulations in regard to disabled individuals have been issued.

--- In February 2001, President Bush issued his New Freedom Initiative which strengthens the rights of individuals with disabilities.

--- In May 2002, The Equal Employment Opportunity Commission (EEOC) issued guidance about the merger of the Americans with Disabilities Act (ADA) which covers private industry, and the Rehabilitation Act which covers federal employees. Requirements of the two acts are now consistent.

--- In June 2001, Section 08 of the Rehabilitation Act was added requiring Federal agencies to make their technologies and web sites accessible to people with disabilities.

--- In June 2002, the Office of Personnel Management established its disability web site, www.opm.gov/disability.

---Navy has now issued very detailed interim guidance and procedures on reasonable accommodation of disabled individuals and employees. Highlights include:

- specific time frames and forms to be used for processing reasonable accommodation requests
- in most cases the decision-maker will have 21 calendar days from the date of the accommodation request is received to issue a decision.
- decision makers are typically the employee's 1st level supervisor

If you receive a reasonable accommodation request from an employee you supervise, contact your Human Resources advisor immediately if you have any questions about it.

Future issues of this newsletter will contain further information about Navy's Reasonable Accommodation policy.