

Labor News & Views

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SURVEY

We have been providing this newsletter since March 2000. Whenever it's time to think about articles and items of interest I find myself wondering if this newsletter is serving its purpose. We began publishing it in hopes of getting employee and labor relations matters out to supervisors, human resource specialists and union representatives. With this issue we've added another feature. Articles relating to equal employment opportunity and alternative dispute resolution will be a part of this newsletter courtesy of the Equal Employment Opportunity Department at the Center.

In order to assess the value of this newsletter I'd like you to take 3 minutes and complete an on-line survey. Don't worry if you don't have access you can print out page 8 and send it to the address provided. You can find the survey at www.donhr.navy.mil/nw/lrsurvey.asp

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SECNAV EEO Statement



Quiz Time

1. An employee under your supervision who has requested a promotion is performing at a level which, at best, could be described as "average" for his current grade. When you call the employee in to tell him what deficiencies exist in his work and how to improve it enough to justify a promotion, the employee insists that you call in the union to represent him in this matter. How would you respond to the employee's demand?

- I would grant the employee's demand since the meeting is a formal discussion.
- I would not grant the employee's demand since the meeting is a personal counseling session.
- I would grant the demand since the meeting concerns negative factors in the employee's work performance.

2. An employee under your supervision has asked for a meeting with you for the purpose of filing a grievance under the negotiated grievance procedure. He also indicated that he has chosen not to use the union as his representative. Would you have any obligation to notify the union?

- Yes, since the meeting would be classified as a formal discussion.
- Yes, but only if the employee had no objection.

c. No, since the subject of the meeting is not applicable to other bargaining unit employees because the grievance is being filed by only one employee.

As the manager of a large organization in an agency, you are aware of your obligation to allow the union to be represented at all formal discussions. Prior to the holding of such a discussion, you inform the union when and where it is to be held and invite the union to attend. At the appointed time, the union fails to send a representative and you have assembled several managers from out of town. What obligation do you have to the union?

a. I must cancel the meeting until the union is represented since the meeting is a formal discussion.

b. Since the union has been afforded the opportunity to be represented at the meeting, my obligation has been fulfilled and I would hold the meeting.

c. Ordinarily I would cancel the meeting, but due to the out of town managers being present I would hold it anyway and provide a written summary to the union at a later date in hopes of avoiding an unfair labor practice charge.

See "Formal Discussion," Page 3

FOLLOWING ORDERS

Following the orders of a supervisor seems to be a no-brainer. For the most part, employees are expected to follow the orders of supervisors. However, we all know that there are times when that doesn't happen and failure to do so may result in the removal of that employee for insubordination, failure to follow instructions, or some other related charges.

When is an employee justified in not following the orders of their supervisor? Let's take a look at some Merit Systems Protection Board (MSPB) decisions that will, hopefully, shed some light on this murky subject.

It's easy to say "Joe was insubordinate and I want him disciplined!" But let's think about what that means. "Insubordination" is the willful and intentional refusal to obey an authorized order of a supervisor that the supervisor is entitled to have obeyed. You've got to prove that it was willful (AKA deliberate) and intentional (AKA a planned in advance). This is a tough burden for you to bear since proof of an employee's intent is required for the charge of insubordination, agencies often use easier to prove charges, including "failure to follow instructions" or "failure to follow verbal directives," which are easier to prove.

The general rule is obey now, grieve later. In most circumstances, employees must first comply with orders of their supervisor and only then, if they disagree with the orders, they can grieve the matter. If you are acting within your authority as a supervisor, employees are expected to respect authority and to follow the orders. They can't say "Frank can stick it in his ear" and simply ignore orders. MSPB has ruled, "The disobedience of proper orders by an employee is done at the risk of being insubordinate and may be sufficient cause for removal."

What factors should be considered? Well, you must give an actual "order." The order should be given clearly to eliminate any doubt as to whether there was an actual order. MSPB has rejected the argument that the employee "failed to obey an order to cooperate in an investigation" when the agency did not prove the supervisor ordered the employee to cooperate in the investigation or even informed the employee he was conducting an investigation. In another case the Board found that an employee's statement in a memorandum that he would not "respond to or implement any dictated unreasonable and unfair managerial practices" was in response to an actual order.



**You're not the
boss of me!**

Another factor is that the supervisor or other individual acting on behalf of the agency must

have the authority to give the order. For example, the Board has found that because an agency did not have legal authority to order the employee to submit to a psychological examination, it could not discipline her for avoiding that examination or otherwise failing to cooperate in connection with the order.

In limited circumstances, an employee may refuse to obey an order. It's not very often when an employee may insulate himself or herself from discipline when failing to follow an order. I can think of two situations:

1. When compliance with the order would place the employee in a clearly dangerous situation. The Federal Circuit Court of Appeals found that an employee refused to obey an order to return to work because, according to her physician, working under the conditions provided by the agency could have endangered her health was justified and she could not be disciplined for her actions.

2. The employee is unable to carry out the order due to restrictions arising from illness or injury. The most common situations where this arises are where an individual is ordered to return to work. The Board has found that an employee who refused an order to return to work because, in her doctor's opinion, such a return would be detrimental to her psychological health cannot be disciplined for her actions.

If you have this type of situation you really need to contact your HR advisor. If you have a situation where an employee has conducted himself or herself in an insubordinate manner, you do not want to have the case turn on how the employee was charged.

FORMAL DISCUSSION

This is a series of quiz articles covering basic entitlements under the Federal Labor Management Relations Statute (5 USC 71). This article is 4 of 10.

I always get nervous when I write articles that cover general principles. You get frustrated when

I tell you that your particular situation didn't quite fit within the context of the Statute. Despite my fears, here I go again! Generally, the Statute states that a meeting between management and an employee would be classified as a formal discussion when:

- more than one employee is impacted by the decisions reached at the meeting; or
- more than one management official is present at the meeting; or
- the meeting may result in a decision on an employee's grievance.

A meeting would usually not be classified as a formal discussion when:

- the meeting is for a "personal counseling" session and does not involve matters affecting general working conditions; or
- the discussion is not at a level which could result in the settlement of a grievance and there is no potential impact on other bargaining unit employees.

When a meeting is a formal discussion, the union must be afforded an opportunity to be represented.

A "counseling session" of the type described in question 1 is not considered to be a formal discussion within the meaning of 5 USC 7114. Since a counseling session, the union does not have to be given an opportunity to be represented at the meeting. The major distinction between a formal discussion and other types of meetings is that a formal discussion has ramifications for collective bargaining unit employees other than just the one employee at the meeting. The correct answer to question 1 "b".



Chatting around the water cooler is not a "formal discussion"

Since a union has an obligation to represent the interests of all bargaining unit employees, it must be given an opportunity to be represented where a grievance may be adjusted. The union will not be representing the employee if the employee does

not want union representation. However, the union must still represent the interests of all employees in the bargaining unit. The theory that kicks in here is that the union cannot fulfill its legal obligations without being aware of any interpretations of the collective bargaining agreement being made by management. Affording the union an opportunity to be represented at this type of meeting ensures that the union will be able to communicate to other employees any interpretation which the union may feel are incorrect. Got all that? The correct answer to question 2 is "a".

Your obligation is to afford the union an opportunity to be represented. If an invitation was extended and no indication was received that the time would be inappropriate, your obligation has been fulfilled and you can hold the meeting. Be careful here. This is a situation that had out-of-towners attending. It would be unreasonable to reschedule. However, if you had a meeting that was attended by local folks and you failed to provide the Union with reasonable notice, you may find yourself in a situation where you committed an unfair labor practice. The correct answer to question 3 is "b".

Next Issue "Management Rights"

LET ME BE CANDID

My Dad use to always say "Do what you think is best." It's been a good guide for me (too bad I haven't always followed his wise words). Let me tell you about a guy who got a little cocky and he is currently unemployed.

He used to work for the FBI as an agent. During an administrative investigation into whether the agent had transported unauthorized passengers in an official agency vehicle, the agent initially admitted to using the vehicle to pick up his daughter from daycare on three occasions. He even signed a statement to that effect. About one

month later, the agent admitted to transporting his daughter 12 to 14 times, and perhaps more than that on several other occasions.

The FBI removed the agent for "lack of candor" because he did not respond fully and truthfully to the questions he was asked during the investigation, which brought into question his effectiveness as an agent. So, is telling the truth, the whole truth, and nothing but the truth, the same as being candid? Yes, with a focus on telling the WHOLE truth. This case had to go to the U.S. Court of Appeals for the Federal Circuit to get the final answer.

Due to the type of position the agent held, the Court held that the FBI could require the highest degree of candor from its agents. Further, the charge of lack of candor was "a broad and flexible concept whose contours depended upon the particular context and conduct involved" (love that legal talk!) Given the circumstances, the FBI was warranted in finding a lack of candor because there was such a great disparity between the employee's initial and subsequent admissions

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:** November 19-21, 2002, 0800-1600 hours at Everett Naval Station. **Who** Managers and supervisors with bargaining units. **How:** To register contact your training coordinator or go to

http://www.donhr.navy.mil/Employees/donhr_training.asp

NOTE: Starting with this issue of Labor News & Views, Code 10 (Equal Employment Opportunity Department) of HRSC-NW will be enclosing articles of interest related to EEO and ADR.

Please contact nwlaboer_nw@nw.hroc.navy.mil if you have ideas, comments, or suggestions about this newsletter, including this new Equal Employment Opportunity section.

ADR (ALTERNATIVE DISPUTE RESOLUTION)

As employees, managers and supervisors, we know how costly and time consuming the traditional methods for resolving conflicts/disputes such as EEO complaints and grievances can be. We also know conflict is a normal part of our daily lives, yet it can often be an uncomfortable experience, especially when it involves the workplace. The Alternative Dispute Resolution (ADR) program is another alternative for resolving these disputes.

The ADR program provides for other methods/techniques for resolving disputes, with mediation being the most commonly used within the Department of the Navy. Mediation is an informal process that uses a neutral third party known as a mediator to facilitate the parties' resolution of the dispute.

Mediation has been used successfully by courts, employers, unions, businesses, and consumer groups to resolve disputes.

Mediators are individuals trained to help people communicate and solve disputes. They meet with the parties and help them talk to each other about their dispute. Mediators do not take sides in a dispute, they are not advocates for either side, and they are not judges. Mediators cannot solve a problem for people; they do help people solve the problem for themselves.

Why should we use mediation? Because it works and it's quick! In the Northwest Region, 73% of the Navy disputes using mediation were resolved during FY01. Mediation is voluntary and confidential. Mediators will not testify for or against either party in a court of law or an administrative process. Parties participating in mediation do not waive any of their rights to grieve, arbitrate or litigate a dispute, and can end the mediation at any time and return to the traditional processes.

Just about any kind of dispute can be mediated. Disputes between employees, between employee and supervisor, grievances, EEO complaints, and disciplinary actions are a few examples.

For more information, contact your Human Resources Advisor.

NO FEAR ACT OF 2002

On May 15, 2002, Public Law 107-174 was passed and signed by the President. "NO FEAR" is the acronym for "Notification and Federal Employee Anti-discrimination and Retaliation Act". NO FEAR requires agencies that lose or settle discrimination and whistleblower cases to pay judgements out of their own budget rather than a general government settlement fund. The new law is expected to hold agencies and managers more accountable for discriminatory practices. The act also requires agencies to post EEO complaint data on their web sites.

[John Ford and James MacPherson](#)
JUNE 2002 MEDIATE.COM

MEDIATION AND RESOLUTION OPTIONS

The use of mediation to resolve EEO disputes is growing exponentially and nowhere more rapidly than the Federal Sector. The EEOC has the largest mediation program in the world and the USPS runs a close second. (For statistics on EEOC and

USPS programs visit
<http://www.mediate.com/articles/eeoc.cfm>.)

Mediation, in its most simple form, is the intervention of a third party (the mediator) into a dispute with the aim of helping the disputants reach an agreement and so end the dispute.

This article provides an overview of the mediation process, in particular EEO mediations. We also share a checklist of items to think about that will prepare you for your mediation session – along with some tips that will improve your effectiveness as an advocate for your agency during the actual mediation process.

The Mediation Process

Most mediations start with an opening statement by the mediator during which the process and ground rules are reviewed. After the parties review and sign the confidentiality agreement, there is an opportunity to clarify roles, secure agreement on communication norms, and get everyone on the same process page. Since parties are often in these disputes because of poor communication and trust issues, the importance of this stage is the tone it sets.

Remember that in mediation it is the other party that you are most interested in engaging. Many parties confuse a mediator for a judge and they will direct their words and arguments towards the mediator. In fact, even seasoned HR and EEO representatives and attorneys sometimes will mistakenly say they are “appearing before a mediator.” To be most effective, you should direct all your energies at convincing the other side – especially since they are the ones who you need to sign off on any settlement agreement reached. Moreover, you want them to implement and comply with the agreement.

After the mediator’s opening statement, each side is given an opportunity to make a short opening statement. Normally, the charging party goes first

while in joint session (a term of art, meaning the parties meet face to face in the same room with the mediator). However, it can take place in caucus (a meeting held in private with the mediator). What you reveal to the mediator in caucus is typically confidential and not conveyed to the other side without your express consent. If in doubt about this or any other aspect of the process, seek clarification from the mediator – you don’t want any surprises because a mediator is using a different set of rules.

Mediators vary in approach and style. Some prefer to keep the parties in joint session as long as possible while others use the caucus early on. The caucus is a useful tool at the disposal of the disputants and the mediator, especially when a monetary settlement is contemplated. It enables venting to take place, sensitive information to be shared, and the parties to formulate their “pitch” before delivering it to the other side. If the message is delivered in a respectful and well-ordered manner, it will increase the likelihood that it will be fully considered.

Once the parties have told their stories and educated one another on their perspective and needs, the stage is set to generate options. Mediation is seldom as simple as “splitting the difference.” More often it is about finding a solution that is going to work for both sides – a unique and creative solution that neither party contemplated at the outset. A skilled mediator helps the parties to fully explore each option by tracking ideas and helping craft an agreement.

Resolution Options

A common method for generating options is brainstorming. Most of us are familiar with the concept. Unfortunately, it is a skill that is under utilized. Furthermore, the times when it is used it may be incorrectly utilized by focusing on the first options that come to mind.

Many charges of discrimination are resolved without the payment of money. Non-monetary options that have been generated include:

- Reinstatement/Return to work
- New Job Placement
- Neutral Letter or Reference
- Skill Training
- Career Counseling
- Apology (verbal and/or in writing)
- Job Interview
- Sensitivity Training
- Transfer
- Accommodation
- Seniority Status
- Removal or Reduction of Disciplinary Action (including reinstatement of pay)
- Future Communication Styles
- Promotion
- Desk Audit
- Mechanisms to Monitor Quality of Work
- Mechanism to Address Future Disputes Expediently

A mediation session typically takes between four and six hours. In some cases, a second session is necessary to complete the mediation. For example, when the parties are close to a resolution, but still need to work out some details – or they need a break to review the tentative solution, possibly with legal counsel. It may even be that new information was discovered during the mediation that needs to be checked out.

Conclusion

Mediation is here to stay. It is likely that its use will increase because of the measurable benefits: better morale and productivity, as well as overall savings in time and money. Although most will experience mediation as a participant rather than as a mediator, it is important for parties to possess good advocacy and negotiation skills for mediation. Properly briefed and trained, participants will ensure that your agency makes deals that are in everyone's best interest.

SECNAV EEO STATEMENT

by **Gordon R. England on 30 May 2002.**

As Secretary of the Navy, I am personally committed to ensuring Equal Opportunity for each Sailor and Marine and Equal Opportunity for each Civilian. The Department of the Navy's leaders, managers and supervisors shall ensure that individuals are judged solely on the basis of merit and ability and with respect for the differences that make us stronger.

Our Nation's diversity is one of its most enduring strengths. A workplace free from unlawful discrimination and reflective of our Nation's diversity is central to maintaining a mission-ready workforce. It is essential that we maintain an environment free of harassment, including verbal or physical conduct that creates an intimidating or hostile work environment for any individual.

I am fully aware that achieving these goals will require both a sincere commitment to and active participation in our Equal Opportunity and Equal Employment Opportunity efforts. That is my expectation of our leaders, managers, supervisors, and employees. My office is fully committed to ensuring that all personnel have the maximum opportunity for selection, advancement, retention and recognition. Therefore, I charge our leaders to empower our Sailors, Marines and Civilians with the means necessary to reach their full potential. I also expect each Sailor, Marine and Civilian to demonstrate their talents and cooperation in helping our leaders meet this expectation.

Through our united efforts to maintain sensitivity to our cultural differences and value the contributions of each member of our team, we will enhance our ability to accomplish the Department of the Navy's mission at home and abroad.

This statement can be found on
www.donhr.navy.mil/Employees/eoo-policy.pdf

Labor News & Views

**Customer Survey
September 2002**

This survey is conducted to determine the customer base level of interest in this Newsletter. Based upon the results of the survey, a decision will be made regarding the continued format of this Newsletter. Your cooperation in completing this survey is appreciated. If you are unable to complete this survey on-line, please mail your input to Human Resources Service Center, Northwest, Attention: Code 40, 3230 NW Randall Way, Silverdale, WA 98383

1. Check the block that describes your position:

Employee HR staff Union representative 1st level supv
 2nd level supv Above

If you responded you are a supervisor, indicate how long.

< one year 1-5 years 5+ years

If you responded you are a union representative, indicate how long

< one year 1-5 years 5+ years

Where is your activity located

Kitsap Peninsula Washington State (outside Kitsap Peninsula)
 Washington D.C. area Other

2. How do you receive a copy of this Newsletter

directly from HRSC-NW directly from HRO staff activity intranet
 link on Navy web site other

3. To what degree does this newsletter provide you with information useful to your job?

None Limited Significant Invaluable

4. Should this Newsletter be continued?

Yes No

5. Please provide suggestions you may have to make the Newsletter a more valuable resource in your job.

Optional Information

Name: _____
Activity: _____
Work Phone: _____