

EMPLOYEE RELATIONS NOTES

March 2008

For the REE Agencies, USDA

Employee Relations Branch (ERB), HRD, ARS
301-504-1355

For management advice on issues of Employee Relations and Labor Relations, please do not hesitate to call your servicing specialist.

All past issues of ER Notes are now on the Employee Relations Branch (ERB) webpage at <http://www.afm.ars.usda.gov/hrd/er/index.htm>.

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Employee Relations Branch Chief

Alan Robinson came from the private sector where he practiced law for over 14 years. He began his career as a law clerk for the Orphan's Court of Baltimore City. One year later, he joined the law firm of Jessamy, Fort & Botts where he flourished in general practice areas, including Employment Law. Mr. Robinson became a partner in that firm, before eventually opening his own practice. While operating a solo practice, he served as a consultant to Federal agencies, including the Agricultural Research Service. As a consultant, he provided legal advice on employment policies and also represented the agencies in matters before the Equal Employment Opportunity Commission and the Merit Systems Protection Board.

Mr. Robinson was raised in a small community in Southside, Virginia. He received his Bachelor's Degree from the University of Virginia and his Juris Doctorate degree from the University of Maryland, School of Law. He is licensed to practice law in Maryland and the District of Columbia.

Mr. Robinson was appointed as a Hearing Committee Member for the Board of Professional Responsibility for the District of Columbia Court of Appeals. As a Hearing Committee Member, he heard cases brought by the D.C. Board against attorneys who have been charged with violating D.C. rules of ethics. He also has served as a Topic Presenter for Federal Dispute Resolution, Inc. (FDR).

He serves on the Board of Governors for Holy Trinity Episcopal Day School. As an avid sports enthusiast, Mr. Robinson coaches basketball and baseball for local community centers and Boys and Girls Clubs respectively.

Please help us welcome Alan to the Employee Relations Branch.

Are Federal Work-life Programs Being Misused?



In today's driving work force, Government agencies are competitive in the area of offering work/life programs to their employees to aid in retention and overall employee satisfaction. However, the question arises: Is it possible for Federal employees to misuse the benefits of their work/life programs?

The REE mission area established work/life programs to provide assistance and support in balancing work and personal responsibilities. The programs include: Telework Program, Child/Elder Care Referral Services, Child Care Tuition Assistance, Employee Assistance, Nursing Mothers, and the Transit Subsidy.

Two of the work/life programs greatly misused are Telework and Transit Subsidy. ***Are you aware the telework program is not an entitlement, but a benefit?*** Employees must meet the eligibility requirements of the program, which include the capability to perform the duties from another location besides the official duty station. Additionally, the approval is at the discretion of the supervisor. Employees are required to check their voicemails and e-mails at regular intervals throughout the day. Additionally, this includes returning customers' telephone calls in a timely manner. Failure in doing so may be perceived as misuse of the program.

Did you know telecommuting cannot be demanded by employees as an accommodation?

The Americans with Disabilities Act (ADA) says you must "reasonably accommodate" disabled employees, and sometimes the accommodation may include modifying their work hours or

permitting them to work at home. However, recent case law has determined that managers **do not** have to grant such requests if the employee's position does not fit into a work-at-home setting. Each request should be considered on an individual basis. The deciding factor should be determined based upon the essential functions of the position requiring the employee's presence at the workplace or not.

Did you know employees are not eligible to receive benefits for days when they do not use mass public transportation to commute to and from work?



Another work/life program benefit is the transit subsidy. Examples of this include: telework, official travel, and annual/sick leave. Although this benefit is an entitlement, it does have restrictions. *Did you know employees are not permitted to receive amounts exceeding their actual commuting costs?* Employees are required to return any leftover transit subsidy benefits to the Commuter Transit Subsidy Benefits Coordinator, whether expired or not. Employees are not permitted to give, sell, transfer, discard, and/or destroy their fare media. If any employee is receiving these benefits, he/she is not eligible to receive free Federal parking. Additionally, carpoolers are ineligible to receive this subsidy, as well as employees receiving disability or executive parking privileges. Transit benefits cannot be used for commuting back and forth to agency-sponsored training, meetings, and/or other events that require public transportation. When in doubt, contact your work/life program manager. The ARS program manager is Tonya Morris, who can be reached on 301-504-1489.

Linda Lewis, HR Specialist



What is the 59-Minute Rule?

It is not a rule at all! It is a period of excused absence from duty for 59 minutes. The term "59-minute rule" was derived from the military, where supervisors are often permitted to let their personnel leave early. The term also refers to the practice of excusing employees from work an hour earlier than their scheduled quitting time. The 59-minute rule is an approved absence period that is at the discretion of managers and supervisors and is often granted on the Friday before a Monday Holiday and/or before a major holiday (i.e. Thanksgiving, Christmas, and New Years). You will not find any statutory or Federal regulation that discusses the 59-minute rule. However, what you will find is an explanation for "Excused Absences." In the REE, Policies and Procedures, Leave, 402.6, under Section 9, "Other Leave," you will find "'Other Leave" which is a category used by the National Finance Center (NFC) to cover all hours of paid

absence authorized by law or administrative action not charged to annual, sick, military, and home leave. Following are examples of leave that fall within the “Other Leave” category: funeral; court; excused absence; tardiness or brief absence; emergency dismissal or closure; voting; examination; blood, organ, and bone marrow donation; officially sponsored functions; and holidays.” An excused absence can be granted for employees who are tardy less than 1 hour for justifiable reasons. An employee arriving to work late because he/she had to return home to feed the dog is not a justifiable reason to grant an excused absence. However, if an employee is late due to a major traffic jam or accident and you as a manager or supervisor are aware of the employee’s usual route to work, and you know that the employee is not an abuser of his/her annual/sick leave, you can grant that employee an excused period of absence for 59 minutes. Keep in mind, as a supervisor you must be given the delegated authority to perform such an action of allowing an excused absence period for employees. As with other policies that are “at the discretion” of supervisors/managers, you should always check with higher-level managers before making a practice of exercising this discretion. If you are a higher-level manager, you should consider consistency within your management unit and other similar units of the organization. If any of the units under your supervision is covered by a bargaining unit, always check the negotiated contract. So, on that Friday before that Monday holiday, or when that employee is late for work for reasons beyond their control, or just because you feel like being generous on that hot summer day (highly unlikely), use your discretion wisely when allowing that period of excused absence.

Margaret Goods, HR Specialist

Somebody’s been searching My Desk!

The office secretary is away on vacation. An employee called to follow-up on a benefits form that he/she submitted to the secretary a month ago for processing. The secretary normally receives these forms and forwards them to your Human Resources Office. You’ve already called the Human Resources Office, and they say they haven’t received the form. When the secretary left for vacation, she put away all of the paperwork from the desk in the various file drawers, overhead cabinets, and other storage spaces in the desk. Can you search her desk for the form? What is the expectation of privacy in the workplace? Are you covered by a union contract? If so, you should check the union contract first to see if there are provisions that outline when, where, who, and/or how any searches can be conducted. What if you are not covered by a union? Unless you have established policies in place and have put employees on notice that they have no expectation of privacy in the workplace, employees generally have a reasonable expectation of privacy in their work areas. The current advice is that searches must be reasonable under the circumstance. In the case above, you have credible reason to believe that the secretary was given the form; you have reason to believe that the secretary still has it, and you have reason to believe that it could be in one of the drawers, cabinets or other storage areas. Secondly, you would be faced with deliberating what would constitute a “reasonable” search. What rules and expectations have you established in your workplace? Have you given employees instructions letting them know that their workspaces are subject to search? Even if you have rules and instructions in place, what has been the past practice in conducting inspections or searches of their workspace? Is it a regular practice for you to look in their inbox or around their desk for

paperwork or for other legitimate work-related reasons? What about in file drawers? Overhead cabinets? Are there places in their desk that are generally considered for “personal storage?” Is there a particular location that you know of where the form would likely be stored? If so, you should start your search there. What if the situation was one in which an act of work-related misconduct was being investigated? The same rules would apply – you need to consider whether your search is justified. If the misconduct is based on a witness’ statement, is the witness a credible witness; and, if so, what is the reasonable scope of the search? What if you’ve searched the entire desk and still haven’t found the form? You did notice a backpack the employee left and you know that occasionally the secretary takes work home in the backpack. Could you search the backpack? Generally, purses, backpacks, briefcases, and similar personal items are **not** considered parts of the workplace; and, therefore, a search warrant or the employee’s permission would be required before you began any search. One caveat for a search of purses, backpacks, briefcases, and similar personal items when employees have been put on notice is that such property may be examined coming or going for security reasons. In such case, it would be under those contexts in which the personal items could be searched.

Angela Newcomb,

HR Specialist

Sleeping on Duty: Medical vs. Conduct

The following is a true story. The problem of a sleeping employee is more widespread than we know:

On her second day, the supervisor found his probationary employee sleeping on the job. The next day, when the supervisor had a witness in the room for the termination process, he told her that while she obviously could not perform the smallest task, sleeping on the job is certainly grounds for immediate termination. The employee asked the supervisor whether he caught her sleeping in the morning or in the afternoon. Flabbergasted, the supervisor asked what was the difference? She said, “If you saw me sleeping in the morning it was because I was tired from drinking the night before.” She continued to say, “If you saw me sleeping in the afternoon, it was because this job is so boring!”

Has this situation or a similar situation happened to you? Have you caught your employee sleeping at his/her desk?

The first step to resolve the issue is to notify the employee that it is inappropriate to be asleep during his/her official duty hours. Once you have made an attempt to inform the employee, we suggest that you monitor him or her more closely. If the problem persists, conduct a second meeting with the employee and let him/her know your concerns. You, as the supervisor, have the right to question the employee regarding a possible medical condition which may be contributing to his/her sleeping on duty. If the employee discloses that he/she has a medical condition, contact your servicing Employee Relations (ER) Specialist for guidance. On the other hand, if the employee states that he/she does **not** have a medical condition; **you must deal with this issue as misconduct**. Dealing with this situation as misconduct requires that a supervisor

document the specific instances of misconduct. For example: “On Wednesday, June 23, 2009, I observed Janice Doe sleeping at her desk. I woke her up and informed her that it was inappropriate for her to be asleep at work.” Once you have gathered all of your documentation, you may forward it to your ER Specialist for review and possible disciplinary action. On a final note, always remember to offer the Employee Assistance Program (EAP) to any employee who may have issues affecting his/her performance and/or conduct. An EAP Counselor can be reached on 1-800-222-0364.



Katina Whitehead, HR Specialist

Are Employees Entitled to Advanced Leave?

Does your employee request additional amounts of advanced leave when he/she already has an excessive negative balance? Don't think that you have to advance additional amounts of leave. There are situational circumstances when a supervisor may advance more leave. Specifically, you may have an employee who has used all of her annual leave and sick leave due to pregnancy complications and she has requested advanced leave for maternity leave. On the other hand, there are circumstances when an employee has an existing negative balance and requests additional leave because he/she has a few doctors' appointments and he/she needs to be compensated for a full 80-hour paycheck. So what do you do? **Bottom line, it's your call!** As stated in the Research, Education and Economics, Policies and Procedures, 402.6, entitled "Leave," it specifically states, "In the event of serious disability or illness, supervisors may grant a maximum of 30 days advanced sick leave to permanent employees. Employees serving under a limited appointment may be granted advanced sick leave not to exceed the amount of sick leave they will earn in the remaining period of employment." **Employees must understand that advancing leave is not an entitlement, it is at management's discretion.**

There are several options an employee may use in lieu of advanced leave. Specifically, an employee may request Leave without Pay (LWOP); participate in the Leave Donor Program or invoke his/her entitlement to the Family Medical Leave Act (FMLA). FMLA states that an employee may request to invoke his or her entitlement to FMLA if he/she suffers from a serious health condition. FMLA allows the employee to use up to 12 administrative workweeks of Annual leave, Sick leave, or LWOP within a 12 month period from the effective date of the emergency. While it is their right to invoke this Act, management needs to understand the nature of the health condition before FMLA is approved. So just remember, every employee's situation is different, and every situation should be reviewed on a case-by-case basis. You can always contact your servicing Employee Relations Specialist for guidance.

What Do We Do?



Your Employee Relations Specialist!! We are here to work closely with you and provide advice and guidance on how best to address employee performance and conduct issues. We will help you prepare performance improvement plans, leave restriction letters, requests for medical information, proposal letters, and decision letters. We also serve as Agency Representatives before MSPB; negotiate settlement of mediated disputes, MSPB appeals, discrimination complaints (affirmative defense in MSPB appeals), whistleblower complaints, Uniformed Services Employment and Reemployment Rights Act (USERRA) complaints, and other workplace conflicts; investigate Office of Inspector General (OIG) Hotline Complaints, prepare Reports of Investigation, and initiate through management, any remedial actions; provide analysis and final decision on formal grievances; and develop employee relations instructional material, with an emphasis on remedial and preventive action, and train all employees. Call us as soon as you suspect you may have a problem with an employee. The names of the ERs, the Areas they service, and their telephone numbers and email addresses are available on the ERB webpage at <http://www.afm.ars.usda.gov/hrd/er/index.htm>.

Inside the Employee Relations Branch



The Employee Relations Branch also includes Alternative Dispute Resolution, Labor Relations, and Employee Relations Policy. These programs are administered REE-wide.

Alternative Dispute Resolution

Coordinates the REE Cooperative Resolution Program (CRP), ensuring all employees are trained in the program and that mediation is offered as a means to resolve conflict. Ensures a cadre of trained mediators assigned throughout REE. For additional information, visit the REE CRP website at <http://www.afm.ars.usda.gov/programs/coopres/>.

Labor Relations

Manages the Labor Relations Program, which includes contract management, negotiations, Partnerships, impact and implementation bargaining, and arbitration. Represents and serves as an advisor to management officials during union contract negotiations.

Employee Relations Policy

Initiates ER policy, develops ER training and communications, adjudicates grievances, and provides investigative leadership. Provides guidance and service in preparation and presentation before MSPB.

<u>Office of the Branch Chief:</u>	<u>Phone Number</u>	
Robinson, Alan	301-504-1355	Branch Chief
Dowell, Kathy	301-504-1355	Secretary
Jones, Kevina	301-504-1345	Support Staff
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Byrd, Mary	301-504-1349	Senior ER Advisor
Burns, Jack	301-504-1519	Labor Relations
Davis, Janelle	301-504-1460	CRP
Fasanella, Mary	301-504-1386	Team Ldr
Frick, Pat	301-504-1450	CRP
Gibson, Betty	301-504-1342	Beltsville
Hernandez, Yansi	301-504-1585	NAA
Jacob, Calvin	301-504-1575	SPA
King, Michelle	301-504-4888	ER Policy
Lynch, LaFondra	301-504-1409	PWA
Martin, Ivy	301-504-1338	SAA
Oyemade, Yemi	301-504-1347	MWA
Rodriguez, Deborah	301-504-1447	Team Ldr/NPA
Rollow, Paula	301-504-1531	MSA
Schmitt, Jeff	301-504-1352	CRP
Terry, Leslie	301-504-1331	HQ/NAL
Whitehead, Katina	301-504-1390/202-694-5623	ERS/CSREES
Williams, Vincent	301-504-1322	Team Ldr/ NASS

ER Notes

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