



The FORUM

Newsletter of the District of Columbia Chapter of the Federal Bar Association

Wendy M. Miller, Newsletter Production Editor

Summer 2006



DC CHAPTER ESTABLISHES YLD

The DC Chapter is pleased to announce the establishment of a Younger Lawyers Division (YLD). The DC Chapter's Younger Lawyers Division will foster relationships with younger lawyers in the Washington DC area. It will provide mentoring opportunities for these attorneys and serve as a conduit for area law school students interested in becoming more involved with FBA sponsored activities.

Members of the DC Chapter who are thirty-six years of age or less or members who have been admitted to their first bar for less than three years, are automatically members of the chapter YLD. No additional dues or membership fees are required.

For questions or comments regarding the YLD, please contact Ms. Kelle Acock at kelle_sutton@yahoo.com. ■



President's Message

By Cary Devorsetz

Our Chapter remains active and committed to the local federal practitioner. Our budget is balanced. We continue to enjoy an excellent relationship with FBA national and the other area chapters. Our Board of Directors is dedicated and committed and we continue to engage our membership and the legal community in Washington with a myriad of quality events and stimulating speakers.

With respect to the composition of the Board of Directors, we recently added two members: Kelle Acock (Department of Justice, Environment & Natural Resources Division) and Frances Sclafani (Department of Defense). Kelle has re-kindled our Chapter's Younger Lawyers Division, and is planning social events and coordinating with the Capitol Hill and Pentagon Chapter Younger Lawyers Divisions on future sponsorship opportunities. She also serves on the national Younger Lawyers Division Board, and acts as a liaison for our Chapter and the National's YLD Division.

Veteran Board Member Patricia Ryan has focused on the Justice Tom C. Clark Outstanding Government Lawyer Award, which recognizes the remarkable accomplishments by career service lawyers employed by the U.S. Government in the District of Columbia or by the District Government. Chief Justice Joseph H. Baum, of the U.S. Coast Guard Court of Criminal Appeals, will be awarded the annual Justice Tom C. Clark Award on July 13. The recipient of the 46th annual award, Nancy Marks, is with the IRS' Division Counsel and Association Chief Counsel, Tax-Exempt and Government Entities. In addition to the Tom C. Clark Award, Patricia spearheads a bi-annual civil litigation seminar, the next of which is scheduled for the fall.

Board Member and President-Elect Silvio Krvaric worked with the FBA's Northern Virginia Chapter to put on "Judicial Perspectives on Daubert in D.C. and Virginia Federal Courts" in early March, which featured speakers Judges Gerald B. Lee and Royce C. Lamberth, U.S. District Court Judge from

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MSPB Decision Affects Job Rights of Government Attorneys

By John J. Rigby

The Merit Systems Protection Board (MSPB) recently held that federal employees in the Excepted Service do not necessarily have to serve a new probationary period when they move from one agency to another. Federal attorney positions are in the Excepted Service. Thus, the MSPB Decision provides additional protections to federal government attorneys.

Federal employees in the Excepted Service have to serve a two-year probationary period, unless they are "preference eligible" (i.e., eligible for veterans preference), in which case they have to serve a one-year probationary period. 5 U.S.C. §7511 (a) (1) (C).

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The District of Columbia Chapter's approximate 1,000 person membership includes members of the judiciary, every department and agency of the federal government, numerous law firms, trade associations, corporations, unions and law schools. A portion of your dues funds the production of this newsletter. **The FORUM** also seeks sponsors for each issue of the publication. Inquiries should be directed to the DC Chapter, Federal Bar Association, P.O. Box 75861, Washington, DC 20013-5861 or e-mail— Wendy M. Miller at Wendysww@aol.com. **The FORUM's** editorial staff welcomes and appreciates articles, letters and suggestions from readers.

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the Eastern District of Virginia and the District of Columbia, respectively. National Council Delegate Ann Clarke coordinated a luncheon event featuring Lois Schiffer, General Counsel of the National Capital Planning Commission at the Federal Judicial Center. We co-sponsored this event with the Capitol Hill Chapter and the Environment, Energy and Natural Resources Section. Ann is also in the process of planning our new luncheon event, featuring Eric Fygi, who for 30 years has been the Deputy General Counsel or Acting General Counsel of the Department of Energy.

Special recognition goes to Gene Kane, who for many years has organized a bi-monthly breakfast at the U.S. District courthouse in Washington immediately following the attorney admission ceremony.

Finally, thank you to everyone who came to our networking happy hour, co-sponsored with the Pentagon and Capitol Hill Chapters, which took place at Sonoma Restaurant + Wine Bar in Capitol Hill in early June. Don't worry, if you missed it, there will be another one soon.■

MSPB Decision, Continued from Page 1

After completion of the probationary period, such employees have the appeal rights and job protections normally associated with federal employment. See 5 U.S.C. §§7512(1),7513(d).

A recent MSPB case held that an Excepted Service employee does not have to serve a new probationary period when he or she transfers from one agency to another, so long as the two jobs are "same or similar." Greene v. Defense Intelligence Agency, 100 M.S.P.R. 447 (2005).

The issue in the case was whether the statutory language concerning "continuous service in the same or similar positions... in an Executive agency" may refer to more than one agency. Greene v. Defense Intelligence Agency, 100 M.S.P.R. at 445. Since legislative terms that are singular in form may apply to multiple subjects or objects, the MSPB found the statutory language ambiguous and considered the legislative history. 100 M.S.P.R. at 449. Based on the legislative history, the MSPB determined that an employee does not have to serve a new probationary period if he or she transfers, without a break in service, to a same or similar position in another Executive agency. 100 M.S.P.R. at 450-451.

As a practical matter, the Greene precedent will allow government attorneys to transfer between attorney positions in different agencies, without having to serve a new probationary period. To be considered "same or similar," jobs only have to be in the same line of work (i.e., involve related or comparable work that requires the same or similar knowledge, skills, and abilities). Mathis v. U.S. Postal Service, 865 F.2d 232, 234 (Fed. Cir. 1988); Burrell v. U.S. Postal Service, 76 M.S.P.R. 204, 209 (1977). All or almost all government attorney positions would appear to be "same or similar" under the broad definition applied by the MSPB and the Court of Appeals for the Federal Circuit.

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In deciding Greene v. Defense Intelligence Agency, the MSPB reversed the Administrative Judge, who had relied, in part, on an unpublished per curiam Court of Appeals for the Federal Circuit case, which reached the contrary conclusion. Greene v. Defense Intelligence Agency, 2005 MSPB LEXIS 623 (D.C. Regional Office, 2005), citing Illich v. Merit Systems Protection Board, 104 Fed App. 171 (Fed. Cir. 2004) (unpublished).

The Illich case came to the Court of Appeals in a strange manner. The two MSPB members were unable to agree on the disposition of the case, so, under Board rules, the Administrative Judge's Initial Decision became the Final Decision, under 5 C.F.R. 1200.3(b). Thus, in Illich, the Court of Appeals did not uphold a binding MSPB precedent. Further, Illich was a pro se case and the Court of Appeals did not have the benefit of legal arguments by any counsel for the Petitioner.

The Greene case was settled after remand to the Administrative Judge, so there will be no appeal to the Court of Appeals for the Federal Circuit. The Greene precedent is controlling law binding on MSPB Administrative Judges, unlike the earlier unpublished Court of Appeals for the Federal Circuit case. ■

The author John J. Rigby was counsel for the appellant in the Greene v. Defense Intelligence Agency case. Mr. Rigby is a partner in the Arlington, Virginia firm of McInroy & Rigby L.L.P.

REGISTRATION FORM -OIRA On its 25th Birthday

Send registration form to: Regina Ashmon, ABA Administrative Law Section, 740 15th Street, N.W., Washington, DC 20005 FAX: 202/662-1529, e-mail: ashmonr@staff.abanet.org

Name: _____

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The American Bar Association Section of Administrative Law and Regulatory Practice,

The Administrative Law and Regulatory Practice Section of the D.C. Bar, and

The District of Columbia Chapter of the Federal Bar Association, present

THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS ON ITS 25TH BIRTHDAY

Thursday, July 20, 2006

**Hamilton Crowne Plaza Hotel
14th and K Street, NW
Washington, DC**

2:30 pm — 4:00 pm

OIRA: Part of the Unitary Executive or Meddling Interloper?

Moderator: Michael Herz

Panelists: David C. Vladeck, Gary Bass, Randolph J. May
This panel will focus on legal authority/institutional relationship issues regarding OIRA, such as: (1) its legal authority to conduct reviews, promulgate bulletins instructing agencies on peer review, risk assessment, guidance practices and the like; (2) relationship of OIRA to the President in terms of the President's knowledge of and involvement in OIRA initiatives; (3) relationship of OIRA/OMB to other agencies, with a focus on relevant distinctions between the Executive branch and independent agencies.

4:15 pm — 6:00 pm

OIRA: From The Inside and Out

Moderator: Phil Harter

Panelists: Curtis Copeland, Jim Tozzi, Don Arbuckle
Former OIRA insiders and leading researchers will focus on the substance of what OIRA does, how well it has done it, what difference it has made or may make in the future, how its activities might be improved.

CLE Credit has been requested

6:00 pm to 8:00 pm

Reception

Cost: \$35 Sponsoring Organization Members, Government Employees, Law Students;
\$50 All Others

Cancellation Policy - No refunds will be processed after July 14, 2006.

See **Registration Form** to the Left on this page:

Questions? Call 202-662-1528





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Call for Articles

The submissions deadline for our Fall Edition is August 20, 2006. Send your submissions to Wendy M. Miller, Newsletter Production Editor, via e-mail to: Wendysww@aol.com. All articles will be reviewed by the editorial committee. Please include the identifying captions with all photos submitted. ■



Join us at the DC Chapter Meetings held on the third Wednesday of each month.

CONGRATS!

By Patricia Ryan

The Justice Tom C. Clark Outstanding Government Lawyer Award recognizes the remarkable accomplishments by lawyers of the career service employed by the US Government in the District of Columbia or by the DC government. The Award is named in honor of Justice Tom C. Clark, the former National President of the Federal Bar Association, for his distinguished career as a government attorney. During his career, Justice Clark served as an Attorney General of the Supreme Court and the first Director of the Federal Judicial Center.

The committee sent out requests to over 80 federal agencies to nominate a recipient of the 46th Annual Tom C. Clark Outstanding Government Lawyer

TOM C. CLARK AWARD FOR 2005 TO NANCY J. MARKS OF THE IRS

Award. The committee consisted of four federal district court judges: Judges Paul Friedman, James Robertson, Ricardo Urbina, and Stanley Sporkin, as well as four DC Chapter officers.

The committee was honored to choose Nancy J. Marks as the recipient of the 46th Annual Tom C. Clark Outstanding Government Lawyer Award.

Ms. Marks is the Division Counsel and Associate Chief Counsel, Tax-Exempt and Government Entities, in the IRS Office of Chief Counsel, where she has broad responsibility over 150 lawyers who publish dozens of regulations and rulings each year that present the IRS's interpretation of the law, who litigate for her Division in the Tax Court and cooperate with the Department of

Justice with respect to tax litigation docketed in other Federal courts, who provide taxpayers with hundreds of individual private letter rulings each year and advise the IRS with respect to law and procedure as it enforces the tax law applicable to exempt organizations, employee plans, federal, state and local government entities, and Indian tribes. She began her federal career in 1973 as a Revenue Agent in Boston, Massachusetts and has served in her present position for more than 11 years. She received the Presidential Rank Award in 2002. Ms Marks graduated from the University of Massachusetts and received her law degree from Suffolk University School of Law, where she received the Tom C. Clark Award for graduating first in her law school class. ■