

# If You Need a Reason to Join NAPUS...

Over the 10 years I have been representing Postmasters and based on the more-than 250 cases I have had before the Merit Systems Protection Board, I have written some articles identifying various reasons why every Postmaster should be a NAPUS member. The members of the Postmaster Representation Committee and I are proud of our successes. Under the NAPUS Legal Defense Plan, our success rate has been high and the costs to individual Postmasters have been low. NAPUS Postmasters pay no attorney's fees or costs in removal cases and only 20 percent in downgrade matters. In contrast, members of the League of Postmasters have to "pony up" 50 percent of the attorney's fees and costs in downgrade cases.

If the upfront costs were not sufficient reason for every Postmaster to join NAPUS, the United States Supreme Court has established a strong incentive in a recent decision. For years, I have been recovering fees and costs from the United States Postal Service in cases where we prevail, and returning same to NAPUS (100 percent in removal cases and 80 percent in downgrade cases) and the individual Postmaster based on the 80/20 split in downgrades. We have recovered fees in the cases we won after hearing, in a lot of cases where we have settled and in cases where the agency knew it was beaten and simply rescinded the action and returned the Postmaster to his or her job.

On May 29, 2001, the United States Supreme Court changed an appellant's ability to recover fees in rescission cases. In *Buckhannon Board and Care Home, Inc. vs. West Virginia Department of Health and Human Resources*, the Supreme Court provided an out for all federal agencies, including the United States Postal Service. The Supreme Court ruled that a litigant is the "prevailing party" and entitled to collect attorney's fees only by virtue of having obtained an enforceable judgment, consent decree or settlement giving some of the legal relief sought where such settlement is enforceable by a consent decree.

The Merit Systems Protection Board has adopted *Buckhannon* in several recent decisions, all to the detriment of employees. In *John A. Nichols vs. Dept. of Veterans Affairs*, (decided Sept. 4, 2001), the Merit Systems Protection Board denied an attorney's fee request where "before the completion of the hearing, the agency rescinded the 30-day suspension in its entirety and returned appellant to status quo ante with full back pay." In

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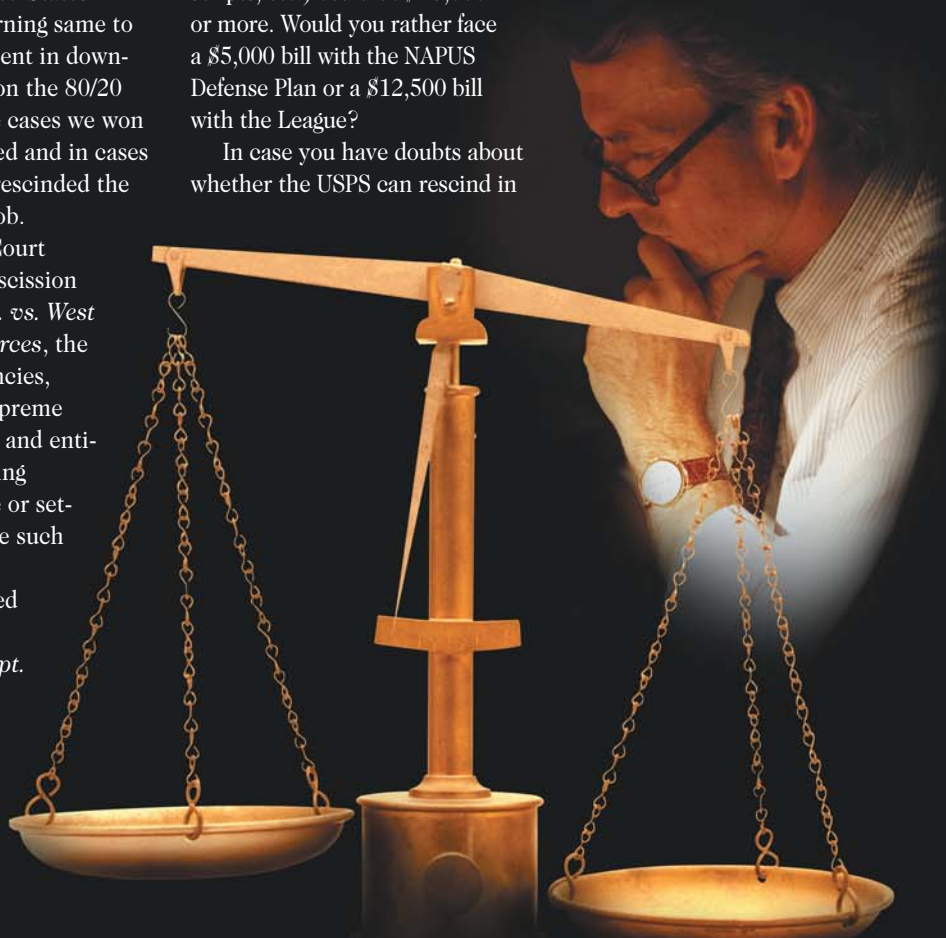
*Geraldine Sacco vs. Dept. of Justice*, (decided Oct. 18, 2001), the Merit Systems Protection Board denied an attorney's fee request where "the agency terminated the indefinite suspension and retroactively placed the appellant on administrative leave ...." Finally, in *Frederick L. Cole vs. Dept. of Justice*, (decided Dec. 20,

2001), attorney's fees were denied where, "during the processing of the appeal, the agency unilaterally rescinded its removal against the appellant and provided appellant with back pay retroactive to the date of his removal."

You may be asking, "What does this mean to me?" It means that where the agency thinks it may lose, it can rescind discipline before there is an enforceable judgment of the board and the appellant Postmaster is stuck with the attorney's fee bill. The end result is that even when you win, you may not be made whole. If you are a NAPUS member and I represent you under the NAPUS Legal Defense Plan in a downgrade, the worst case is that you would owe 20 percent of the fees and costs in a downgrade matter. NAPUS pays the 80 percent.

On the other hand, if you went with the League in the same downgrade matter, you would be stuck with 50 percent of the bill. In a "worst-case scenario" where we have gone through discovery, filed the prehearing submissions, had the prehearing conference and have gone through most or all of the hearing before the agency realizes it is losing and rescinds, the attorney's fees and costs (travel, transcripts, etc.) could be \$25,000 or more. Would you rather face a \$5,000 bill with the NAPUS Defense Plan or a \$12,500 bill with the League?

In case you have doubts about whether the USPS can rescind in



an MSPB case and how expensive it can be, it just happened to a California Postmaster. The case was a nightmare. The United States Postal Service failed to produce an employee witness, failed to inform me in a timely manner of the identity or knowledge of two witnesses and only advised me that a key witness had moved to Montana less than two weeks before the depositions were to occur. The bottom line was a lot of motions, subpoenas, process service fees, a lot of travel (trips to California and Montana), a lot of depositions and a lot of extra costs due to the United States Postal Service's "style" of litigation. Fortunately, the depositions paid off and we successfully defeated the United States Postal Service's case.

I say "we" because the Legal Defense Plan is a team effort. I took the depositions, as I do in all cases. However, while I was in California, I had the invaluable assistance of NAPUS National PM Rep Jaime Chacon. In Montana, I was fortunate to have been assisted by NAPUS Montana Chapter Rep Janice Erfle.

The night before the prehearing conference with the administrative judge, the agency folded its tent, rescinded the downgrade (an EAS-20 to a PTF clerk), reinstated the Postmaster to his EAS-20 position and promised him back pay. The downside is that, under the *Buckhannon* decision and the MSPB cases following that decision, he gets no attorney's fees.

I am a firm believer that if a charged Postmaster is to prevail, the key to success before the Merit Systems Protection Board is full and complete discovery. Yes, depositions of all of the witnesses the agency will use against the Postmaster are expensive (perhaps that is why the League attorneys take so few, if any). However, if the allegations and presumed facts are not dissected and examined, if the witnesses' credibility and memory are not tested and if the quality of corroboration between the witnesses is not measured, the charged Postmaster runs a substantially higher risk of losing the appeal.

That is why I take depositions in each, every and all cases. Please do not believe the League nonsense that only their plan provides an attorney and that the NAPUS Defense Plan provides only a lay postmaster rep. That is just propaganda.

I wish I could promise all Postmasters they will prevail before the Merit Systems

Protection Board and be returned to their positions. Unfortunately, that is something that I cannot do. In certain types of cases, the agency will prevail most of the time. For example, the agency will most probably prevail where it has evidence demonstrating there is criminal conduct (fist fight with customer) or grossly discriminating acts or speech (suggesting a box of chains be sent to the district manager who is African American).

Do not plan on being a Postmaster if you "borrow" money from the cash drawer or kite money orders. You will lose if you use the government's credit card for non-government purchases (paying child's college expenses). You will lose if you demand the performance of sex acts in return for employment, work hours or anything else. Please note that I say the agency will prevail "most" of the time in such matters. The agency will prevail where it can demonstrate the truth of the allegations. Do not get confused about the burden of proof. The agency, in general, must prove its case only by a preponderance of the evidence (the weight of a gnat's hair over 50 percent). The "beyond a reasonable doubt" standard applies only in criminal matters.

The above list is an ugly list of charges, but sometimes, even with the ugliest charges, the complaining employees may lie, sometimes they are mentally disturbed and sometimes, when cross-examined, we find that "witnesses" did *not* witness anything. Sometimes, they simply are repeating rumor. Under such circumstances, if you want to save your job, you need full discovery and complete depositions and that costs money. Can you afford to go it alone?

The California matter mentioned above, where the USPS folded its tent, is a perfect example. The Postmaster, an employee of 28 years with unblemished government service, was charged with kicking an employee, slapping a female employee on her posterior, making racial slurs and employing illegal hiring practices—to state just part of the charges; there were more. I stated above that the depositions paid off—they did, in a big way. Not a single allega-

tion made by the USPS could be corroborated. Witnesses who claimed to have seen the events, under cross-examination, placed them in different locations. Their credibility was destroyed. Witnesses who claimed to have been touched admitted

they really did not see the Postmaster do anything. The racial slur was not a "slur" at all. It was something read from a newspaper. No one was illegally hired; a PTF had been "borrowed" from another office. This case should be a warning to those Postmasters who believe that because they do everything by the book, they

never will be charged.

In the California case, a union steward and four or five employees out of 48 did not like the fact that the Postmaster required them to do their jobs. They complained, and upper-management bought into their line of drivel without conducting a real investigation, despite the fact the Postmaster had nearly three decades of service without discipline and always made budget and had high merits. Without spending the money to secure discovery, in all probability an innocent Postmaster would have been lost. Through discovery, we found the truth and, in this case, the truth saved the Postmaster.

It can happen to you, too. No one is immune to unsupported charges.

The bottom-line question is simple. You have three choices: You can join NAPUS and, at worst, owe me 20 percent of the fees; you can join the League and could owe the League attorney 50 percent; or you can go it alone or with a private attorney and pay 100 percent of all costs. There is every reason to be on the NAPUS team and no reason not to join NAPUS.

If you already are a NAPUS member, sleep well tonight. The NAPUS Legal Defense Plan is there like a protective blanket. If you have friends who are not NAPUS members, you should show them this article and encourage them to sign on with NAPUS immediately.

If you are not a NAPUS member, what are you waiting for?

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