AFGE

LEGAL RIGHTS FUND

Third Quarter Report

2002

Prepared by the Office of the General Counsel

The Legal Rights Fund Report, per the instructions of the National Executive Council (NEC), is issued on a quarterly basis to the NEC, National Representatives, Council Presidents, and Department Directors. This is the third quarterly report (June 12, to November 18, 2002, in conjunction with the meeting of the NEC). This report details only those cases that are newly filed and those old cases that have had some change in status. For a full report on existing cases, and for further discussion of what each of the cases noted below is about, please refer to the previous Quarterly Report for the year. This current Report, per the instructions of the NEC, simply provides the latest action taken on each case. Cases marked by an "*" indicate decisions that AFGE won in significant areas.

CASES IN THE SECOND DISTRICT

Closed Major Administrative Cases **2nd District**

L-2143 (7j) AFGE Local 2143 and Department of Veterans Affairs, Office of the Inspector General (BN-CA-01-0120) The OIG filed a complaint in state trial court against the Local Vice President alleging violations of state criminal law statutes. GCO requested the OIG to investigate the complaint. OIG refused to withdraw the complaint and responded that filing the complaint was within the scope of the Inspector General's authority. AFGE filed a complaint with the President's Committee on Integrity and Efficiency to investigate the VA OIG. PCIE found no violations. AFGE filed unfair labor practice charge with FLRA. OIG subsequently filed another criminal complaint against same local official, alleging different criminal statute violations. AFGE amended ULP charge to reflect second criminal complaint and filed another complaint with the PCIE. Criminal complaint, ULP charge, and PCIE complaint are currently pending. VP has retained private defense counsel and has court appearance scheduled for 10-27-01. Some charges have been dismissed or dropped. VP will keep GCO informed of criminal proceeding. VP was convicted of minor criminal offense. Union withdrew its ULP in light of the conviction. Unclear whether any administrative action will be taken against the VP.

CASES IN THE THIRD DISTRICT

ACTIVE COURT CASES **3rd DISTRICT**

L-3951 (7j) Faltin, Butterbaugh, Marderness, Bono v. DOJ, 02-3331 (Fed. Cir.)(PH-3443-01-0134-I-1 to 0137-I-1) Full-time employees of Federal Bureau of Prisons filed discrimination claim against DOJ and BOP. Employees are also reserve members of the uniformed services. Employees claimed that DOJ policy of charging leave for non-workdays and holidays during a period of reserve duty violated Uniformed Services Employment and Reemployment Rights Act ("USERRA"). Appellants filed request for class appeal on behalf of a class of similarly situated employees. ALJ denied class certification. Appeal filed 4-2-01. Hearing date for substantive issues held 4-9-01. Administrative Judge held that Board lack jurisdiction over appeal: the alleged improper charging of leave is not denial of a benefit of employment. Appeal filed to full Board. On 5-30-02, Board affirmed initial decision, holding that reservists were not denied a benefit of employment on account of their reserve obligation or service when the agency changed their military leave for non-workdays falling between workdays for which they took military leave. Petition for review filed 7-29-02, opening brief filed 11-4-02.

ACTIVE MAJOR ADMINISTRATIVE CASES **3rd DISTRICT**

L-1902 (7j) Local 1902 v. Defense Contract Management Agency (FLRA BN-CA-01-0540) Union charged agency with failure to bargain ULP when agency implemented a new

dress code without prior notice to the union. Case was settled with return to the status quo ante and agreement to negotiate as appropriate. Agency made a limited effort at negotiating and then re-implemented the dress code and filed a ULP against the union for not bargaining in good faith. (FLRA BN-CO-020401) GCO representing Local 1902 in both matters. Agency withdrew its ULP charge against the union. Charge against the agency still pending.

CASES IN THE FOURTH DISTRICT

ACTIVE COURT CASES — 4th DISTRICT

L-446 (7f) AFGE Local 446 v. Principi, Secretary of Veterans Affairs and Roswell, VA Under Secretary for Health, 1:02-CV-613 (D.D.C.) Arbitrator ruled that registered nurses represented by the local were wrongfully deprived of evening and weekend differential pay. The VAMC employing the registered nurses failed to file exceptions to the award with the FLRA, thereby making the award "final and binding." Nevertheless, during the course of unfair labor practice proceedings to enforce the award, the VA Under Secretary for Health issued a 38 U.S.C. §7422 ruling that the underlying issue was not lawfully subject to the negotiated grievance procedure. Based on this belated ruling, the FLRA pursuant to §7422(d) declined to exercise jurisdiction to enforce the award (57 FLRA No. 137). AFGE filed suit 4-1-02 on the theories that (a) the VA Under Secretary lacks 38 U.S.C. 7422 authority to void a "final and binding" award; (b) the Under Secretary's authority under §7422 does not extend to grievances seeking compliance with existing standards; (c) the Secretary's belated use of her §7422 authority after a final and binding arbitration award is a denial of substantive due process in violation of the Fifth Amendment; and (d) in voiding the award, she misapplied the provisions (§7422(b) and (c)) applicable to night and weekend differential pay for VA registered nurses. Government answer to complaint filed 6-3-02. AFGE motion for summary judgment and supporting brief and papers filed 8-29-02. AFGE cross-opposition and reply brief filed 10-30-02, VA reply brief due 11-18-02. Decision to follow all briefing.

L-1923 (4f) [Doe] v. Principi MJG-01-0236 (D.C.Md.) The plaintiff was terminated from employment a week after he revealed to his supervisor that he is HIV+. He filed an administrative complaint alleging discrimination. Through union pressure, his employment was restored. AFGE also represented him in the administrative hearing. In a decision issued on 6-23-00, the EEOC upheld its award of $185,000 in compensatory damages. On his behalf, AFGE filed a suit alleging discrimination and seeking full compensatory relief in the amount of $300,000. The agency filed a motion to dismiss and for injunctive relief. AFGE filed a brief in opposition. Judge granted the defendant's motion without prejudice and gave plaintiff leave to refile provided that the new pleadings were consistent with the judge's ruling. AFGE refiled the suit and the defendant filed its answer denying the discrimination and then filed a motion for injunctive relief. AFGE filed a brief in opposition. Judge granted the defendant's motion without prejudice and gave plaintiff leave to refile provided that the new pleadings were con

sistent with the judge's ruling. AFGE refiled the suit and the defendant filed its answer denying the discrimination. Trial scheduled for 11-12-02.

ACTIVE MAJOR ADMINISTRATIVE CASES **4th DISTRICT**

L-446 (7e) AFGE Local 446 and VA, Asheville, NC, (FMCS 01-16208) Local filed grievance on behalf of cardiac catheterization laboratory technicians alleging that management had violated contract and FLSA by failing to compensate for on-call time on evening shifts on days when they had taken sick leave. Arbitrator 5-29-02 sustained grievance but declined to order interest or attorneys' fees. AFGE filed exceptions on 7-3-02 seeking interest and attorneys' fees. Pending.

L-1738 (4e) Kelly v. Veterans Affairs, (EEOC 2004-0659-2002100814). Ms Kelly filed a complaint alleging that she was a victim of ongoing discrimination based on her race (black) and prior EEO activity. This discrimination takes the form of a pattern of continued harassment by management officials at the Salisbury, VA Medical Center. In particular, Complainant Kelly asserts that management: reduced her Proficiency Rating, paid her at an incorrect step for over a year, denied her funding to attend a Leadership Conference, made demeaning comments, reassigned Complainant to a position that was below her qualifications, and attempted to undermine her professional reputation. The Agency conducted an insufficient and factually incorrect investigation, and Complainant has requested a hearing with the EEOC as well as filed a Motion for Sanctions.

Closed Court Cases **4th District**

L-1992 (7h) Murray v. MSPB and DoD (intervenor), 01-3226 (Fed Cir) (Murray v. Department of Navy, DC-0752-00-07-95-M-1) DoD employee was suspended for 30 days for failure to follow leave authorization requirements. Employee appealed suspension to MSPB. Pursuant to clause in local supplement to master agreement, DoD stayed the suspension pending a decision by the MSPB. Administrative Judge held that MSPB lacked jurisdiction over appeal because DoD did not issue a final decision because of the stay. MSPB affirmed (88 MSPR 306 (2001)). AFGE filed petition for review, filed brief 6-18-01. After AFGE appealed decision to Federal Circuit, the Board moved to remand for further consideration. While matter was before Board, agency indicated its intent to remove employee under a RIF and not to effectuate the suspension. MSPB order 2-21-02 directed parties to submit evidence and argument regarding mootness of the appeal. On remand, MSPB did a complete turnaround, holding that the contractual provision did not deprive it of jurisdiction. It further ruled that the appeal over the suspension was not moot, because the agency had not demonstrated that references to suspension were expunged from his personnel file. It also found that the employee's claims relating to his separation were actionable, and forwarded the allegations for docketing as a new appeal. Case being handled henceforth by Local 1923 attorney in further administrative proceedings that lack precedential significance.

Closed Major Administrative Cases **4th District**

L-446 (7j) AFGE Local 446 and VA Medical Center, Asheville, NC, (FMCS 01-04409) Local filed grievance seeking backpay on behalf of several AOD's (Administrative Officers

of the Day). The VA circulated a new position description to all VA hospitals and it was up to the individual hospitals to decide how to implement it. At Asheville the agency did not upgrade the position and the employees at the time made a decision not to file a classification appeal. The employees eventually did get the promotion, and several years after the fact the Local filed the grievance for backpay for the period up to the actual promotions. Arbitrator denied the grievance 8-12-02, based inter alia on Testan v. U.S., a Supreme Court case that holds that a federal employee cannot be paid for a higher graded job unless he/she actually and formally holds that particular higher graded job.

L-331 (7e) Rawlings v. Dept Veterans Affairs, (MSPB PH-0752-02-0001-C-1) VA removed LVN for alleged patient abuse. AFGE assisted employee in negotiating settlement agreement with reinstatement with suspension and last chance agreement. AFGE filed petition for enforcement 4-3-02 over VA's failure to pay employee full back pay. After payment, AFGE withdrew petition 6-10-02. ALJ dismissed petition 7-23-02.

L-1622 (7e) Department of the Army, Fort Meade, Maryland and AFGE Local 1622, (FLRA WA-CA-01-0411) FLRA Regional Director refused to issue a complaint on union's ULP, which asserted that the agency had issued removal letters to Motor Vehicle Operators while the local was still attempting to negotiate over management's decision to reclassify the position that resulted in the removals. AFGE filed appeal to FLRA GC 11-23-01, arguing that Regional Director erred in concluding that union had not requested bargaining over management's decision. FLRA GC rejected appeal 7-25-02. Affected employees have retained private counsel to file request for reconsideration.

CASES IN THE FIFTH DISTRICT

ACTIVE COURT CASES — 5th DISTRICT

L-1858 (7k) AFGE, et al. v. Rumsfeld, et al., 00CV003001 (DC Cir). Under DOD and Army regulations, each installation is required to determine its fire apparatus needs based on response time and the amount of fire flow (water) to the various structures on the facility. And, the regulations specify the minimum number of firefighters that must be employed to staff the apparatus. AFGE's declaratory judgment action, filed 12-15-00, challenges Redstone Arsenal's failure to maintain five fire companies as mandated by the regulations. Redstone occupies more than 12 million square feet of Army structures. In addition, its tenant, the George C. Marshall Space Flight Center, (NASA), occupies over 4 million square feet of building space. Many of the structures are extra hazard buildings housing fuels, hydraulic fluids, motorized missile launchers, explosives, radiation hazards and a variety of chemicals. Redstone has failed to staff adequately for the three companies it claims it is maintaining, and some of its firefighters were hired under term appointments even though the purposes for which term appointments can be made do not cover those in the DOD fire service. The suit asks the Court to order Redstone Arsenal to comply with the regulations by maintaining and fully staffing, at a minimum, five fire companies comprised of permanent employees. DOD's answer was filed 5-17-01, raising numerous legal defenses but admitting most

of the factual allegations. AFGE requested limited discovery (interrogatories and request for production of documents). In response, the government moved for a protective order and on 8-20-01 filed a motion to dismiss. AFGE response filed 9-17-01. Court, without argument, granted defendants' motion to dismiss at status conference on 9-29-01. After AFGE filed its notice of appeal 11-20-01, the government moved for summary affirmance, which the Court of Appeals denied on 3-13-02. On 10-4-02, AFGE filed its brief on the subject matter jurisdiction question. Government's brief due 11-4-02, and oral argument is set for 1-17-03.

ACTIVE MAJOR ADMINISTRATIVE CASES **5th DISTRICT**

L-509 (7g) Local 509 and Shades of Green, (FLRA AT-RP-02-0051) AFGE filed unit clarification petition on 9-6-02, in response to ULP charges filed by former Human Resources officer Cochran (who apparently will be returning to that position in 12 months following a closure and renovation project), who sought union membership. Cochran presently reassigned himself to position of Benefits Program Management Analyst. Awaiting further direction from FLRA.

L-1960 (7g) Local 1960 and DFAS Filing grievance regarding civilian performance plan for accounting technicians as it may impact prohibited personnel practices, associational interests, and privacy concerns.

L-2207 (7g) Blue v. VA Birmingham Medical Center On 11-1-01 LP Doris Blue received a notice proposing her removal for alleged repeated AWOLs, failure to follow leave procedures, failure to follow orders, and disrespectful conduct. AFGE filed reply 11-20-01. No action taken by VA until 2-14-02, when it rescinded the original removal proposal and substituted a removal proposal eliminating charge of disrespectful conduct and adding charge of requesting leave under false pretenses. It provided 53 specifications of AWOL, failure to follow leave, and absent from post without permission. AFGE submitted extensive request for data 2-19-02 and request for extension to reply. VA denied request for data, AFGE filed second reply. VA removed plaintiff effective 3-25-02. Local filed grievance, denied 4-17-02. Arbitration invoked 5-9-02, held 9-24 through 9-26-02. Transcripts received, post hearing briefs due 11-18-02.

L-2510 (7g) Roach v. DFAS AFGE on 9-5-02 filed request for information, demand letter to lift bar, and grievance regarding the 8-23-02 14 day suspension of LP Roach for "lack of candor" and AWOL arising from his travel and attendance at a management briefing to union officials held in Washington, DC. On 10-18-02, fourth step grievance denied. Invoking arbitration.

Closed Court Cases **5th District**

L-1869 (7g) Dept Air Force, 315th Airlift Wing, Charleston Air Force Base v. FLRA, 01-1275 (DC Cir) AFGE moved to intervene, granted 8-22-01, in this appeal by the Air Force of a FLRA decision that overturned the three day suspension of the former Local 1869 President. The FLRA had found that the LP was engaged in protected activity when he made contact ("touching, threat-like gestures, and ranting") and that he did not engage in flagrant misconduct. AFGE brief filed 2-12-02. Oral argument heard presentations of AF and FLRA 4-25-02. DC Circuit issued decision on 7-12-02 reversing the deci

sion of the FLRA, and thus dismissing the ULP complaint against the Air Force, and reinstating the three day suspension against the former Local President.

SIXTH DISTRICT

ACTIVE MAJOR ADMINISTRATIVE CASES **6th DISTRICT**

L-1744 (7f) AFGE Local 1744 and Raytheon Technical Services, Inc., (FMCS 02-_) Private sector company organized by Local 1744 after "privatization in place" has fired long-time local activist and former LP for alleged fraud in his use of unpaid leave under the Family and Medical Leave Act. Local maintains that the employer's allegations are both false and fabricated in order to exercise reprisal against the grievant for protected union activity. Arbitration hearing scheduled for 11/21-22/02.

Closed Court Cases **6th District**

(7j) AFGE v. AFMC and Tinker AFB C3-00-31, (S.D.Oh.) Complaint for declarative and injunctive relief filed 3-15-00 concerning a contract award of 300 jobs in a civil engineering function to a private company, DynPar, after an A-76 competition. Complaint alleges that MEO was the low bidder, as affirmed twice by the Appeal Authority at Tinker AFB, and that the appeals taken by DynPar at Wright-Patterson AFB were improper and not allowed by the A-76 Handbook. Government filed motion to dismiss on 5-19-00. AFGE's response filed 6-8-00. Decision 3-27-01 dismissed for lack of jurisdiction, holding that (1) individual plaintiffs lacked prudential standing, (2) individual plaintiffs' interests fall outside the zone of interests protected by the statutes underlying the action, (3) plaintiffs' "generalized grievance" is insufficient to establish standing, and (4) AFGE lacks "associational standing" because the individual plaintiffs lack standing. Notice of appeal to Sixth Circuit filed 5-23-01. AFGE opening brief filed 7-5-01. AFGE reply brief filed 9-17-01. Oral argument was cancelled based on the decision of the Sixth Circuit in a similar case decided on 5-8-02. That case held that federal employees lacked "prudential standing" to challenge an A-76 contract award in federal court. On 8-28-02 the Sixth Circuit denied AFGE's appeal based on the same precedent.

SEVENTH DISTRICT

ACTIVE COURT CASES **7th DISTRICT**

L-15 (7h) Knight v. Dept of Army, 02-3368 (Fed. Cir.) Appealing MSPB decision holding that the Board lacked jurisdiction over demotion as a RIF action, denying employee's claim to grade retention, and affirming demotion as an adverse action.

EIGHTH DISTRICT

None

CASES IN THE NINTH DISTRICT

ACTIVE COURT CASES **9th DISTRICT**

L-922 (7f) U.S. Dept Justice, Federal Bureau of Prisons, FCI Forrest City, Ark. v. FLRA and AFGE Local 922, 02-1239 (D.C. Cir.) In 57 FLRA No. 179 (6-5-02), the FLRA held that the employer's refusal to provide both (a) a supervisor's manual and other documents pertaining to how disciplines and disciplinary investigations shall be conducted by management, and (b) the investigatory file of a disciplined employee, constituted a ULP in violation of 5 U.S.C. §7116(a)(1), (5), and (8). The employing agency petitioned for review on 8-1-02 to overturn the FLRA order. AFGE, on behalf of Local 922, filed a motion on 8-26-02 for leave to intervene. Motion granted 9-4-02. Awaiting briefing schedule from Court.

ACTIVE MAJOR ADMINISTRATIVE CASES **9th DISTRICT**

L-903 (7j) Dr. G.P. v. Department of Veterans Affairs, VA hospital in Missouri has imposed a five-day suspension, based on false charges, on the President of an AFGE Local that represents only Title 38 employees. AFGE is providing representation to the LP before a statutory Disciplinary Appeals Board. Hearing held week of 1-29-02. This case could be one of the first such matters to go to court under the new VA statute if the Board rules against the employee. **Favorable decision issued on 10-2-02**. The three member DAB was able to see through the claims of neglect that had been brought artificially against Parker by the hospital director. In the DAB recommended decision, adopted by the Acting Deputy Under Secretary for Health, Parker was completely exonerated. ["After a thorough review of all evidence and testimony, the Board concluded the facility failed to meet its burden of proof and did not substantiate a charge of patient neglect."] **In this significant case, a well represented Title 38 employee was able to successfully contest a patient care related disciplinary action. The fact that the agency's final decision was subject to judicial review undoubtedly helped to persuade the agency to reach the right conclusion in this case. [A complete transcript of the hearing was available to the DAB.] The statutory language that AFGE fought for in 1991 when the applicable Title 38 personnel laws were overhauled helped lead to a positive result in this case ten years later.** AFGE filed a motion for attorneys' fees on 10-9-02, which is pending.

CASES IN THE TENTH DISTRICT

ACTIVE COURT CASES **10th DISTRICT**

L-2263 (7h) AFGE, et al., v. United States, et al., 02-5142 (DC Cir.) 00936 (D.D.C.)(RMU) On 5-1-00, plaintiffs filed complaint and motion for TRO seeking to enjoin provisions of DoD appropriations law exempting majority-owned Native-American firms from competitive contracting requirements (such as the cost comparison mandated by OMB Circular A-76). Plaintiffs claim that the Native American exemption constitutes an impermissible racial preference under the equal protection and due process guarantees of the Fifth Amendment. Plaintiffs particularly sought to enjoin two contracts for base maintenance operations to a firm d/b/a Chugach Mgt. Services, Inc, a subsidiary of Chugach Alaska Corp., a Native Alaskan corporation. Chugach intervened on behalf of defendants. Defendants opposed request for preliminary relief on grounds that plaintiffs lacked standing and that the provision represented Indian tribal legislation that was rationally related to legitimate federal purpose. On 6-30-00, court issued lengthy decision (104 F.Supp.), agreeing with plaintiffs that provision was subject to strict scrutiny, but nevertheless holding that preference was narrowly tailored to serve compelling interest. Dispositive motions pending. Plaintiffs moved to amend complaint to include individual who has been RIF'ed as a result of Chugach contract. On 5-11-01, court denied motion to amend complaint on grounds that doing so would be futile. Parties have completed their briefing on their cross motions for summary judgment. Court directed the parties to discuss settlement, to no avail. On 3-29-02, court granted government's motion for summary judgment and denied AFGE's motion. AFGE appealed to D.C. Circuit, where matter is pending. AFGE brief due 11-27-02, oral argument set for 3-13-03.

ELEVENTH DISTRICT

None

TWELFTH DISTRICT

ACTIVE COURT CASES **12th DISTRICT**

L-1278 (7j) Tupper v. Dept of Navy, 02-3364 (Fed. Cir.) Complaint filed 8-22-02. After the plaintiff formed an AFGE local and was extremely acting in attempting to stop the contracting out of the agency's workload, the agency decided not to outsource but to operate more efficiently in-house by conducting a RIF. As a result of the RIF, the plaintiff was one of three employees separated. With private counsel, plaintiff's MSPB case resulted in unfavorable decision. On request, AFGE petitioned the Fed Circuit, attacking the MSPB decision because it appeared to ignore the availability of a defense that antiunion animus leading to a separation in a RIF is illegal under 5 U.S.C. §2302(b)(9). Opening brief due 11-20-02.

L-2152 (7f) AFGE Local 2152 and Savlov v. Principi and Roswell, CV-N-02-0379 (D.Nev.) A VA physician represented by the local filed a grievance under the collective bargaining agreement alleging unlawful age discrimination, after the agency took away surgical duties from the physician that resulted in a loss of physician specialty pay. Before the grievance could be submitted to arbitration, on 5-5-02 the VA Under Secretary for Health issued a 38 U.S.C. §7422(d) determination that the issue was excluded from the grievance procedure by operation of §7422(b)(1) and (3). AFGE filed suit against the agency on the basis that the VA lacks authority under §7422(d) to exclude a grievance by a VA medical professional when that grievance alleges unlawful intentional discrimination. Complaint filed 7-15-02, VA motion to dismiss filed 9-23-02, AFGE opposition filed 10-10-0, Government reply filed 10-23-02. Awaiting decision on VA motion to dismiss. Assuming the court denies the pending motion to dismiss, AFGE anticipates that the case will be decided on cross-motions for summary judgment, that a briefing schedule will be set for completion in early 2003, and a decision issued shortly thereafter.

ACTIVE MAJOR ADMINISTRATIVE CASES **12th DISTRICT**

L-470 (7j) Local 490 v. Veterans Benefit Administration AFGE representing a Rating Claims Examiner who received a proposal to remove based on alleged failure to meet a newly adopted production standard that had become a critical element during his PIP. AFGE's response attacked the new production standard as illegal. Decision pending.

L-1858 (7k) AFGE Local 1858 v. Defense Distribution Depot, San Joaquin, DLA, (FLRA O-AR-3552). On behalf of its firefighters, Local filed a two part grievance, alleging that agency (a) had failed to employ the number of fire prevention personnel required by DODI 6055.6, and (b) had noncompetitively filled positions. Arbitrator found that agency had taken alleged actions, but decided that he could not provide a remedy, that the "issue involved staffing which was specifically reserved under the management's rights provisions." AFGE filed exceptions with FLRA, arguing that the finding was contrary to law. Decision pending.

Closed Major Administrative Cases **12th District**

L-1223 (7g) AFGE Local 1223, Pendergast and Brown v. SSA, OHA, San Bernardino, CA, (FLRA SF-CA-0217) On 12-27-01 AFGE filed ULP charge against SSA for five day suspensions against two OHA employees for alleged failure to cooperate in an investigation. The charge asserted violations of Weingarten principles, for the agency denied a request for a knowledgeable union representative to represent the employees in the internal investigation. On 6-28-02 the Regional Director issued a letter declining to issue ULP complaint. AFGE appealed this decision to FLRA GC on 7-16-02. On 10-26-02, the GC upheld Regional Director's decision to not issue ULP complaint.

CASES IN THE FOURTEENTH DISTRICT

ACTIVE COURT CASES **14th DISTRICT**

L-631 (7h) Williams, et al. v. D.C. Water and Sewer Administration and AFGE Local 631, (RCH)(D.D.C.) Action brought by National Right to Work Foundation, alleging constitutional deprivation in absence of objection procedures in agency shop unit.

Closed Court Cases **14th District**

L-2 (4f) Broom v. Army, 00-88 (ESH)(D.D.C.) Employee removed 1-9-98 by Walter Reed alleged race and disability discrimination in an informal EEO complaint, MSPB appeal, and formal complaint with EEOC. At a pre-hearing MSPB conference, plaintiff withdrew his MSPB appeal to pursue his EEOC complaint. The MSPB ALJ advised that the withdrawal was with prejudice and that he could pursue the matter through the EEO forum. EEOC dismissed his complaint due to his MSPB appeal. Plaintiff filed pro se in district court. Army filed 8-28-00 motion to dismiss for failure to exhaust. AFGE assumed representation and seeks to carve an exception to the failure to exhaust rule in mixed cases, where employees have relied upon instructions of administrative judges. The court held that the plaintiff was excused from exhausting his administrative remedies because the Army defendant had notice of plaintiff's intent and failed to clarify the situation when the MSPB misled the plaintiff. Army defendant filed motion for summary judgment and AFGE opposed the motion. The court ruled that there were disputes of material fact appropriate to present to a jury regarding plaintiff's allegations of race discrimination and retaliation, but dismissed allegations of age and disability discrimination. Court referred case to a magistrate judge for mediation and set the case for trial in 9-02. Jury trial held 9/9-13/02. Plaintiff rejected settlement offers made by defendant, including increased offer made after close of plaintiff's case at trial. After deliberations, jury awarded verdict for defendant on all counts.

CASES IN THE COUNCILS

ACTIVE COURT CASES **COUNCILS**

C-53 (7d) AFGE Council 53 v. FLRA (D.C. Cir) Appeal filed 10-10-02 from decision of FLRA in AFGE C-53 and U.S. Dept of Veterans Affairs, Vista Clinic, 58 FLRA No. 4 (8-12-02), wherein the Authority found non-negotiable a union proposal that the union be present during performance based job interviews. Briefing to be scheduled.

C-33 (7e) Blanco, et al., v. United States 00-02-8-SEC (D.C. P.R.) (Local 4052 and BoP, MDC Guaynabo, Puerto Rico (O-AR-3234)) On 10-13-99, GCO filed exceptions to arbitration award that held that BoP acted lawfully in not paying employees for sleep time for a two-day period in which employees were required to remain at the facility because of an emergency situation caused by Hurricane Georges. AFGE asserted that agency was required to apply private sector regulation that does not permit sleep time to be de

ducted unless there is an express or implied agreement with employees. FLRA issued decision 5-16-00 denying exceptions, because it construed AFGE's argument as an attack on the validity of OPM FLSA regulations that can only be presented in district court. AFGE filed complaint 9-19-00 on behalf of 126 members of Local 4052, and amended the complaint 2-23-01 adding OPM as a defendant. AFGE served discovery requests on BoP 4-10-01. Government filed motion to dismiss and/or summary judgment 7-10-01. AFGE filed opposition and cross-motion for summary judgment 8-7-01. Government filed supplemental opposition 9-25-01 arguing that 11 plaintiffs should be dismissed because they are FLSA exempt. AFGE filed reply 10-16-01 submitting evidence that some are covered by FLSA. Parties filed pre-trial orders 11-30-01. Court issued decision 3-15-02 dismissing the case on theory that the CSRA prohibits court litigation on FLSA claims that can be raised in arbitration. AFGE filed appeal to Federal Circuit 5-9-02. Court issued order 8-19-02 staying further proceedings in this case until two related cases, Mudge v. U.S. 02-5024 (Fed. Cir.) (see above under National Office), and O'Connor v. U.S. 02-0526 (Fed. Cir.) were decided. Decisions in Mudge and O'Connor issued 10-17-02. AFGE will file submission by 11-17-02 stating AFGE's position on the further disposition of the case.

C-83 (7e) James v. Dale, Misc. Dkt. No. 700 (Fed. Cir.) OPM filed petition for review 4-19-02 appealing arbitration award that reversed the discharge of a Border Patrol agent for allegedly associating with a known or suspected narcotics law violator. Arbitrator had found that the agent did not know that the individual was a known violator. AFGE opposition to petition for review filed 6-14-02; OPM filed reply 7-12-02. Court granted OPM's petition for review 10-2-02, briefing proceeds.

ACTIVE MAJOR ADMINISTRATIVE CASES **COUNCILS**

*C-53 (7e) National Veterans Affairs Council and Department of Veterans Affairs (FMCS 94-14797) Council 53 filed a grievance 10-25-93 asserting that employees throughout the Department were wrongly classified as FLSA exempt. DVA denied the grievance, and the Council requested a panel of arbitrators. AFGE and DVA agreed to review the contended exempt positions to explore settlement. **Parties executed settlement agreement 8-24-94 for employees of Veterans Benefits Administration (VBA), which guaranteed six years back pay to employees who had been wrongly classified as FLSA exempt. On 8-18-00 AFGE and VA entered into settlement that changed all AFGE bargaining unit computer specialists to non-exempt, with back pay from 10-25-91 to 1-7-95, and double damages from 1-8-95 to 7-17-00.** The parties continued to negotiate unresolved issues of compensation for comp time, additional back pay, and double damages and other positions in VBA and VHA. **VHA changed all GS-11 334 computer specialists to non-exempt effective 12-8-00, and paid them back pay to 1-22-95**. AFGE asserted that this back pay is insufficient, and pursued further compensation for these employees. AFGE filed exceptions 6-22-01 to arbitration award received by former NFFE Local 1745 which held that GS-12 Computer Specialists were non-exempt but that GS-13 Specialists were exempt. Exceptions denied by FLRA 5-7-02. VA announced intention to conduct "depositions" of Computer Specialists in Information Technology branch in DC. AFGE has advised Computer Specialists at the Information Technology branch of their right to decline to participate in interviews. **National Cemetery Administration and AFGE entered into settlement agreement 4-5-02 that changed all NCA AFGE bargaining unit com**

puter specialists GS-13 and below to nonexempt with back pay from 10-25-91 to 1-7-95 and double damages from 1-8-95 to 2-25-01. As with the VBA computer specialists agreement, the parties will continue to negotiate unresolved issues including compensation for comp time, additional back pay, and double damages. Local 1923 counsel began fact-finding interviews of computer specialists in Information Technology branch in preparation for arbitration. Arbitration on back pay period and additional payment of liquidated damages or interest for Computer Specialists at VBA held 10-22-02. Briefs due 12-6-02.

C-117 (7d) AFGE Council 117 v. Department of Justice and INS AFGE General Counsel's Office has referred to arbitration an overtime pay case (Fair Labor Standards Act) involving immigration employees represented by our INS Council. **Various INS Council employees are already covered by a previous FLSA case and are receiving over $80,000,000 over five years in settlement of that earlier case.** The ongoing AFGE INS case seeks FLSA overtime for those employees not covered by the earlier case. In 11-97 the Agency conceded over 85% of FLSA exempt positions in the AFGE bargaining unit were wrongly exempted. **Favorable arbitration decision 3-23-00**. Demand for further action made to agency 3-30-00. Agency and union are currently working through arbitrator to calculate backpay for individual bargaining unit members. Request for **$115,000 interim attorneys' fees and costs filed with agency 6-9-01, awarded and received 8-01**. Meeting with arbitrator and agency in 2-02. Additional information sought from claimants in 5-02. Met with arbitrator on 8-14-02.

Closed Court Cases **Councils**

*C-45 (7h) AFGE v. Veneman, 01-5035 98-893 (D.C. Cir.)(AFGE v. Glickman) On 4-8-98, AFGE, eight meat and poultry inspectors, and the Community Nutrition Institute filed a lawsuit against the USDA, Food Safety and Inspection Service, seeking to enjoin the USDA from shifting its statutory duty to conduct post-mortem carcass-by-carcass inspections of meat and poultry to the industry. The issue is whether this shift violates the Federal Meat Inspection and Poultry Products Inspection Acts that mandate a post-mortem inspection, by federal inspectors, of each meat and poultry carcass that is prepared as articles of commerce and are capable of use as human food. In 7-96, the USDA issued its final regulation on "Pathogen Reduction; Hazard Analysis Critical Control Point ("HACCP") systems." Generally, HACCP contemplates that companies identify hazards that arise at critical points in their food production process. They then devise and implement measures to minimize the risks associated with those hazards. The regulation also imposes certain standards for the reduction in the occurrence of e.coli and salmonella contamination. The inspectors do not oppose either of these initiatives. Rather, they challenge the USDA's position that HACCP requires a fundamental departure from the nearly century-old statutory mandate that the federal government inspects meat and poultry carcasses before attaching the USDA's seal of approval. On 9-23-99, court denied Government's motion to dismiss, but granted summary judgement, on grounds that statutes do not define inspection. Plaintiffs appealed. D.C. Circuit issued decision on 6-30-00 declaring USDA's model project illegal and remanded to district court for further proceedings. Upon issuance of mandate, AFGE filed in district court for injunction. In response, USDA proposed to modify project by placing one inspector at a fixed point at end of poultry line and placing an inspector at a fixed point in hog plants, and moved for declaration that the program meets statutory

requirements. Court issued order declaring slaughter model project lawful. AFGE appealed. Brief filed 9-26-01, oral argument held 1-11-02. On 3-29-02, court affirmed decision of district court, upholding Secretary's authority to experiment with HIMP. However, it left open the door for litigation over merits of the program.

NATIONAL OFFICE CASES

ACTIVE COURT CASES **NATIONAL OFFICE**

(7k) Mehle v. American Management Systems, Inc. 01-7191 (D.C. Cir.) AFGE is participating with a number of other federal employee unions and organizations who are members of the Employee Thrift Advisory Council as an amicus curia in support of the Plaintiff, Director of the Federal Retirement Thrift Investment Board. The appeal seeks to overturn the decision of the district court holding that the Board, through its Executive Director, could not sue a contractor that defaulted on a contract for design and implementation of a record-keeping system for Thrift Savings Plan Participants' accounts. The original suit sought $250 million in actual and punitive damages from AMS for breach of contract and fraud. The district court ruled that any suit brought against a contractor to recover damages to the Thrift Savings Fund must be initiated and controlled by the Justice Department. The briefing schedule is expected to be set shortly.

Closed Court Cases **National Office**

(7e) Alves v. U.S., 90-478C (Cl.Ct.) Complaint filed 6-4-90 on behalf of electronic technicians, Series 0856, who lost their FLSA non-exempt status as a result of the "reverse presumption" OPM regulations declared invalid in AFGE v. Devine. The Government refused to reclassify these employees as FLSA nonexempt, despite the fact that the regulations that were the basis for the change in status have been invalidated. Court issued order 12-18-95 holding litigation schedule in abeyance. **Settlement reached for plaintiffs employed by USIA, including back pay from 6-88.** Government has provided back pay estimates for Navy plaintiffs, including estimated calculations for two plaintiffs for whom pay records are not available. USIA plaintiffs have been paid. AFGE completed review of the two outstanding plaintiffs' backpay discrepancies and forwarded to the Government. Government agreed to make changes to back pay per AFGE's objections to back pay calculations and subsequently forwarded new final backpay figures to AFGE without documents showing adjustments made for each pay period. AFGE requested complete sets of calculations for each plaintiff. **Parties agreed on back pay and attorneys' fees.** Parties resolved issue of how to handle payment to heirs of deceased plaintiffs. Parties signed settlement agreement 6-25-02 and filed stipulation for dismissal with court 7-18-02. Case dismissed 7-18-02, plaintiffs have been paid.

7(j) Mudge v. United States 02-5024 (Fed Cir) AFGE participated as amicus curia in support of plaintiff. District court ruled that plaintiff, who was covered by a collective bargaining agreement, could not bring his pay claims to federal court, because the grievance/arbitration mechanism was his sole avenue by which to seek relief. The dis

trict court reaffirmed the ruling in Carter v. Gibbs, even in the face of the 1994 amendment to 5 U.S.C. §7121(a)(1). AFGE had expected the amendment would nullify that decision's restriction against going to court on statutory pay claims by an employee covered by a grievance/arbitration provision. AFGE filed a detailed amicus brief in the Fed Circuit because of our high level of interest in this matter 2-11-02. There are now three cases before the Federal Circuit that raise this issue. Briefing completed 3-7-02, oral argument held 7-11-02. **Favorable decision issued** 10-17-02. Court held that the word "administrative" that was added in 1994 overrules Carter, in that, while the grievance arbitration mechanism may be the exclusive administrative route for our bargaining unit employees to assert their rights under federal pay statutes, they still retain their rights to litigate these matters in federal court. **This decision will have a significant and broad ranging positive impact by insuring that federal employees who are covered by a collective bargaining agreement are not stripped of their rights to litigate important pay and other issues in federal court like any other citizen.**