AFGE

LEGAL RIGHTS FUND

First Quarter Report

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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 first quarterly report (January 1, 2002, to March 5, 2002, in conjunction with the meeting of the NEC). Cases marked by an "*" indicate decisions that AFGE won in significant areas.

CASES IN THE SECOND DISTRICT

ACTIVE 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. Some charges have been dismissed or dropped. VP will keep GCO informed of criminal proceeding.

CASES IN THE THIRD DISTRICT

ACTIVE COURT CASES **3rd DISTRICT**

*L-1709 (7f) Dept of Air Force, 436th Airlift Wing, Dover AFB, Dover DE v. FLRA and AFGE Local 1709, 01-1373 (DC Cir) In 57 FLRA No. 65 (2001), the FLRA reiterated its longstanding position that the union's right to be present at a "formal discussion" per 5 U.S.C. §7114(a)(2)(A) extends to attendance at so-called "mediation" sessions on formal EEO complaints. The Air Force on 8-24-01 filed a petition for review in the D.C Circuit to challenge the FLRA's ruling. AFGE Local 1709 filed on 9-12-01 a motion for leave to intervene. AFGE intervention granted 10-16-01. No briefing schedule yet established.

ACTIVE MAJOR ADMINISTRATIVE CASES **3rd DISTRICT**

L-1331 (7j) Shieh v. Department of Agriculture (FMCS Case No. 99) A GS-9 support scientist was fired for allegedly failing to report his attendance while on annual leave at a conference in mainland China on food irradiation, an area that the scientist last worked in over 10 years ago. AFGE was asked to handle the arbitration case because it involves complicated issues, a ULP, and some EEO and handicapped condition claims. Decision issued 9-25-00. Arbitrator ordered the employee reinstated to his position but without back pay. Attorneys' fees petition filed on 10-15-00, requested status of decision on fees petition three times.

L-3951 (7i) Faltin, Butterbaugh, Marderness, Bono v. DOJ (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. Em

ployees 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: alleged improper charging of leave is not denial of a benefit of employment. Appeal forwarded to full Board.

Closed Major Administrative Cases **3rd District**

L-1156 (7j) AFGE Local 1156 v. Navy Supply Systems Command (FLRA BN-CA-01-0149 + BN-CA-01-0166) Local filed ULP on 12-20-00 against agency for maliciously violating a clear past practice of permitting union officers to use official time to represent employees in tenant agencies for which they do not work. Regional Director dismissed case 2-28-01. Appeal filed timely, with extension granted, with FLRA GC on 4-23-01. FLRA GC denied appeal on 6-14-01.

CASES IN THE FOURTH DISTRICT

ACTIVE COURT CASES **4th DISTRICT**

*L-1992 (7i)) 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. Decision pending.

Closed Court Cases **4th District**

*L-2065 (7f) Brown v. Department of the Navy, 00-3003 (Fed. Cir.) In 83 MSPR 230 (8-10-99), the full MSPB, by a 2-1 vote, upheld the removal of a federal employee for alleged off-duty misconduct. AFGE appealed the MSPB decision to the Federal Circuit. The main issue was whether the Marine Corps can justify, on nexus grounds, the removal of a civilian employee on the sole basis that the employee, while off-duty, participated in a consensual romantic affair with the spouse of a Marine officer who was deployed overseas during the length of the affair. On 10-20-00, the Court, by a 2-1 vote, issued an adverse decision. Petition for rehearing and suggestion for rehearing en banc filed 12-1-00. Petition denied 12-28-00. AFGE filed petition for certiorari with **SUPREME COURT** on 3-28-01. **SUPREME COURT** denied certiorari 6-29-01.

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 of the district court decision. If the Court denies the government's motion, a briefing schedule will be issued.

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. AF brief filed 12-24-01, FLRA brief filed 2-1-02, AFGE brief filed 2-12-02. Oral argument set for 4-25-02.

ACTIVE MAJOR ADMINISTRATIVE CASES — 5th DISTRICT

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.

*L-1045 (7e) DVA, Gulf Coast System Veterans Health Care System and AFGE Local 1045 (FLRA AT-CA-00001) A VA physician and union officer's physician specialty pay cut in half because he was on 50% official time and involuntarily transferred to another department. Local 1045 filed a ULP concerning the reduction in pay and the transfer. The FLRA Regional Director refused to issue a complaint on the basis that provisions of Title 38 divest the FLRA of jurisdiction over the matter. Regional Director subsequently rescinded his letter and issued complaint against VA 8-25-00 alleging that the reduction of the physician's specialty pay and transfer violated 5 U.S.C. §7116(a)(1) and (2). VA filed answer 9-18-00, alleging lack of jurisdiction and other defenses. VA Under Secretary for Health issued determination 1-23-01 stating that the matters at issue in the complaint concerned matters arising out of professional conduct or competence, peer review, or the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. §7422, and were outside the scope of collective bargaining. Based on this letter, the FLRA Regional Director withdrew the complaint and dismissed the ULP charge. Appeal to FLRA General Counsel filed 4-11-01. FLRA GC denied appeal 7-10-01 on grounds that statutory language precluded FLRA jurisdiction.

*L-1922 (7g) Griffin Services and AFGE Local 1922, (NLRB 10-RC-15258) In landmark case involving AFGE's right to organize private sector contractors, Griffin Services claimed that AFGE was disqualified as a bargaining representative on the basis of conflict of interest because AFGE vigorously opposes contracting out. On 12-26-01, AFGE filed a brief in response. NLRB Region 10 Regional Director refused 1-10-02 to disqualify AFGE from representing employees and ordered an election for 2-8-02. Local 1922 lost that election of representation of the contracted out employees by just several votes.

L-2172 (7g) AFGE Local 2172 and Defense Commissary Agency, (FMCS 000525-11296-A) AFGE filed exceptions on 5-26-01 to arbitrator's decision dismissing the arbitration as procedurally non-arbitrable, based on not jointly requesting a panel of arbitrators within seven days as provided under the contract. The case involves a 14 day suspension for creating a disturbance/threatening behavior. FLRA issued decision 12-7-01, denying union exceptions, finding that traditional grounds for reviewing award do not pertain to challenging procedural arbitrability issues.

SIXTH DISTRICT

ACTIVE 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 2-27-01 dismissed for lack of jurisdiction, holding that (1) individual plaintiffs lacked prudential standing, (2) individual plaintiffs' interests fall outside the zone in interests protected by the statutes underlying the action, (3) plaintifs' "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, reply brief filed 9-17-01. Oral argument to be scheduled.

ACTIVE MAJOR ADMINISTRATIVE CASES **6th DISTRICT**

L-720 (7e) AFGE Local 720 and BoP, USP Terre Haute, (O-AR-3487) Arbitrator issued award granting back pay to employees for BoP's failure to compensate employees for pre-shift and post-shift activities. AFGE filed exceptions to award 2-22-02, challenging holding that back pay would run from the date of filing of the grievance rather than the two or three year statute of limitations in the FLSA. Agency filed exceptions to holding that employees should be compensated from the time they first enter the prison, rather than the time that they arrive at the control center. Opposition to agency exceptions due 3-25-02.

SEVENTH DISTRICT

Closed Court Cases **7th District**

*L-2119 (7f) AFGE Local 2119, et al. v. Cohen, et al., 97-4020 (C.D.Ill.), 00-3512 (7th Cir) Suit filed 3-5-97. Local and eleven members challenged Department of Army's military procurement and industrial policies to contract out weapons production instead of producing supplies at the Rock Island Arsenal. Suit alleged "wrongful privatization" as a violation of Arsenal Act, BRAC, military procurement laws, and the Administrative Procedures Act. AFGE sought declaratory and injunctive relief. Government motion to dismiss filed 9-5-97, decision 2-3-98 dismissed case based on lack of standing. Appeal filed 3-2-98. The 7th Circuit Court decision issued 3-18-99 in AFGE's favor in part, holding that employees have standing to sue over contracting done in violation of Arsenal Act. Case remanded to district court for further proceedings. Unfavorable district court decision issued 8-23-00. AFGE filed appeal 9-22-00, filed brief 11-7-00, oral argument held 3-28-01. Adverse decision issued 8-21-01. No further review sought.

CASES IN THE NINTH DISTRICT

ACTIVE COURT CASES **9th DISTRICT**

L-916 (7) Local 514 Transport Workers Union, Local 916 AFGE, et al., v. State of Oklahoma, 01-633-S (E.D. Ok) Suit filed 11-13-01 by six unions including Local 916 (with ap

proval of GCO and NVP) against Oklahoma and Governor Keating challenging the constitutionality of the right-to-work state law that criminalizes improper dues deduction. Cross motions to dismiss and for summary judgment are pending. AFL-CIO legal department is lead counsel.

*L-916 (7f) Tinker Air Force Base, Oklahoma City Air Logistics Center, Oklahoma City, OK v. FLRA and AFGE Local 916, 01-9528 (10th Cir) An FLRA administrative law judge issued an initial decision upholding the FLRA's longstanding position that the union's right to be present at a "formal discussion" per 5 U.S.C. §7114(a)(2)(A) extends to attendance at so-called "mediation" sessions on formal EEO complaints. FLRA issued an order 5-29-01 making the ALJ's decision final when the Air Force failed to timely file exceptions to the ALJ's decision with the proper FLRA office. The Air Force challenged this order and the underlying rationale of the FLRA on the Section 7114(a)(2)(A) issue with the 10th Circuit on 7-30-01. AFGE Local 916 intervention filed and secured on 8-20-01. FLRA on 8-13-01 filed a motion to dismiss for failure to file exceptions with the FLRA. Order of Court on 11-26-01 deferred dismissal issue to panel, and ordered briefing on merits. Air Force brief filed 2-6-02, FLRA and AFGE briefs due 3-8-02.

ACTIVE MAJOR ADMINISTRATIVE CASES — 9th DISTRICT

L-96 (7i) Utility Systems Operators at St. Louis VAMC facility appealed VA decision to downgrade them from WG-5406-11 to WG-5406-10. Operators are meeting with management to discuss accuracy of job description. OPM tabled the appeal. VA agreed to amend job description. Operators must sign accuracy statements before the appeal can proceed.

*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. GCO 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. Awaiting decision.

Closed Major Administrative Cases — 9th District

L-919 (7j) Raney v. Bureau of Prisons (FLRA DE-CA-010737) ULP charge filed 5-22-01 alleging delay in complying with arbitration award of attorneys' fees. ULP sought fees and costs related to efforts to compel payment. Case withdrawn in light of receipt from agency of interest on belatedly paid attorneys' fees.

CASES IN THE TENTH DISTRICT

ACTIVE COURT CASES — 10th DISTRICT

*L-2263 (7h) AFGE, et al., v. United States, et al., 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. Parties have completed their briefing on their cross motions for summary judgment. Court directed the parties to discuss settlement, to no avail. Decision pending.

ACTIVE MAJOR ADMINISTRATIVE CASES — 10th DISTRICT

L-1822 (7i) Houston v. AFGE L-1822 (DA-CO-00892) Former VA employee sued union for duty of fair representation violation, alleging union failed to properly represent him during MSPB appeal. Union filed answer stating that charge was untimely; six month statute of limitations had expired. Decision pending.

L-2437 (7g) AFGE Local 2437 and Dept Veterans Affairs, Dallas Ft Worth National Cemetery (FLRA No.) Reviewing Local's request to FLRA for restraining order regarding the termination of temporary appointments for alleged involvement in organizing activity.

TWELFTH DISTRICT

ACTIVE 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 asserts violations of Weingarten principles, for the agency denied a request for a knowledgeable union representative to represent the employees in the internal investigation. Awaiting investigation by FLRA.

Closed Court Cases — 12th District

*(7j) AFGE v. Barstow DLA and United States, 00-130C (Ct Fed Claims) With the assistance of local counsel highly specialized in federal contract law, AFGE requested that the award of a DLA warehousing function at Barstow to EG&G, a private contractor, be reversed, because the MEO was actually the low bidder. In a decision issued 5-10-00, the court concluded that the union did not have standing to challenge an A-76 con

tract award under the FAIR Act. Appeal filed in Fed Cir, seeking to convince the Court that the lower court should have found that the federal employees and AFGE did have "prudential" or "zone of interest" standing to challenge an illegal A-76 contract award. Case has been fully briefed, oral argument held on 4-6-01. This case has taken on an even greater significance since as of 1-1-01 all contract claims must be filed in the U.S. Court of Federal Claims, pursuant to 28 U.S.C. §1491(b). On 7-23-01 the court issued a decision that finds the union and the federal employees have no "standing" to challenge OMB A-76 contract awards under the language of the statute. This very significant negative decision, if left standing, would mean that no court review is possible of A-76 matters, since the Court of Federal Claims as of 1-1-01 has exclusive jurisdiction of all procurement contract related claims against the U.S. AFGE filed a petition for certiorari with the **U.S. SUPREME COURT** 10-22-01. Petition denied 1-22-02.

CASES IN THE FOURTEENTH DISTRICT

ACTIVE 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's decision is pending.

Closed Court Cases **14th District**

(7h) AFGE v. District of Columbia, 96-1717 (D.D.C.) on removal from 95-CA-001934 (DC Superior Ct) AFGE and its District locals filed suit on 3-9-95 challenging the City Council's enactment of legislation imposing a ten day furlough and 12% reduction in union wages for 1995. The unions contended that the cuts unconstitutionally impair the collective bargaining agreement between the unions and the City. The pay cut was scheduled to go into effect on 4-2-95, and AFGE moved for a preliminary injunction. On 3-29-95, the City and unions reached an MOU whereby employees agreed to a 6% pay cut, four additional furlough days, and certain changes in overtime calculations for FY 1995. Although the City Council finally approved the MOU, it unilaterally changed the effective date of the agreement to 4-30-95, thus allowing the 12% pay cut to go into effect for two two-week pay periods in April. Plaintiffs pursued summary

judgment on the basis of the contract impairment arising out of the legislatively mandated cut for these two pay periods, and filed a motion for summary judgment on 6-2-95. On 4-25-96, Congress enacted an appropriations bill that expressly ratified Council's action. Plaintiffs amended the complaint to challenge federal appropriations law. United States, as defendant, removed case to federal district court and moved to dismiss. District of Columbia also moved to dismiss. AFGE opposed these motions and moved for summary judgment. Under court ordered mediation, the City and unions agreed to settle for $950,000 in back pay. The Control Board approved the settlement agreement on 2-18-98. On 10-19-98, the union notified the District that it had completed its review of the list of qualified employees and submitted changes. DC Government issued payments by 6-6-99. Although parties are still attempting to identify individuals wrongfully excluded from the payout, the litigation is at an end.

Closed Major Administrative Cases — **14th District**

L-3403 (7d) Mateen and African Development Foundation Filed ULP with FLRA and expedited arbitration of case involving alleged retaliatory reassignment and TDY of union activist. Expedited arbitration held and adverse decision issued against grievant. No appeal filed.

CASES IN THE COUNCILS

ACTIVE COURT CASES — **COUNCILS**

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 deducted 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. Pending.

*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. Decision pending.

ACTIVE MAJOR ADMINISTRATIVE CASES **COUNCILS**

C-33 (7e) Council 33 and Bureau of Prisons Council 33 filed grievance over BoP's failure to compensate employees for performing pre- and post-shift duties. AFGE sent settlement offer to BoP 3-12-99. AFGE informed BoP that figures used for minutes engaged in pre- shift duties and number of days worked per year were too low. Agency agreed to provide the documents upon which these calculations were based. **BoP and Council 33 entered into settlement agreement 8-10-00 compensating all employees for pre- and post-shift duties who were in bargaining unit between 5-17-89 and 1-1-96.** Amount of payment depends on length of time in unit. Most grievants have been paid. Parties are reviewing records to determine if there are other grievants who have not been paid.

*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.** VBA on 6-17-96 provided AFGE with a list of positions classified as exempt. AFGE is conducting review of these positions to determine if they are properly 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 will continue 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 asserts that this back pay is insufficient, and will pursue further compensation for these employees. VA is reviewing FLRA status of Computer Specialists in National Cemetery Administration and Board of Veterans Appeals, and will make settlement offer to AFGE. 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. Pending before FLRA. 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. VA submitted draft settlement agreement for Computer Specialists at the National Cemetery administration to GCO. GCO submitted proposed revisions to draft agreement 10-26-01. VA and AFGE are negotiating final terms of settlement agreement. Local 1923 counsel is beginning fact-finding interviews of computer specialists in Information Technology branch in preparation for arbitration.

C-53 (7e) National Veterans Affairs Council and Department of Veterans Affairs AFGE filed grievance 5-12-98 alleging that VA forced nurses to accept compensatory time rather than overtime in violation of Title 38. Parties agreed to hold grievance in abeyance while AFGE investigates extent of violation. AFGE and Council have surveyed local presidents to determine extent of violation. Affected local has forwarded relevant records to AFGE for review.

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**.

*(7d) SSA FLSA arbitration This case involved a major attack by AFGE's General Committee and General Counsel's Office on the SSA's overtime pay policies. We have challenged SSA's position that numerous AFGE bargaining unit positions are exempt from the provisions of the Fair Labor Standards Act. **In a series of five arbitration decisions, the AFGE has been successful in obtaining over $151,300,000 (to date) for over 45,000 AFGE bargaining unit employees, in essentially all of our bargaining unit positions** (with the exception of several OGC attorneys). The Union has successfully arbitrated three decisions and successfully defended these decisions in three FLRA decisions found at 44 FLRA No. 66; 47 FLRA No. 78; and 49 FLRA No. 40. Further, the AFGE has filed ULP complaints to enforce and increase the SSA's payments with the FLRA. Complaints have issued and hearings (or stipulated facts) have been held, and the ALJ has upheld the ULP charges filed by AFGE on all counts. The ALJ found that SSA: (1) underpaid AFGE bargaining unit members by failing to

use actual records to compute backpay and by using erroneous payroll calculations; (2) improperly offset leave against overtime; (3) failed to follow the arbitrator's direction on the calculation of "suffer or permit" overtime; and (4) failed to use reasonable methods to contact former employees due overtime. The agency exceptions to the ALJ decision were dismissed in toto by the FLRA in 53 FLRA No. 87. In late 7-98, the AFGE (with the approval of the Council) negotiated with the Agency for full payment of its FLSA overtime obligations to the AFGE bargaining unit. **SSA will pay AFGE bargaining unit members $151,300,000**. **AFGE believes that this payment of $151,300,000 is the largest litigation victory in the sixty-year history of the FLSA.** Most payments pursuant to this agreement were made to the AFGE bargaining unit in late 9-98. A claims process for "suffer or permitted" overtime is currently taking place in the Agency, under the terms of the agreement with SSA. SSA is also using specific methods to locate former employees or survivors of former employees.
Pursuant to the 7/98 Settlement Agreement, a Join Labor Management Committee has been meeting in Baltimore for several months working on specific Suffer or Permitted issues. Settlement negotiations ongoing on travel time FLSA overtime. Suffer and permit calculations ongoing. GCO has submitted interim attorneys' fees demand for $23,000 6-6-01.
AFGE has successfully litigated the collection of $433,000 in attorney fees.

Closed Court Cases **Councils**

C-214 (7j) U.S. Department of Air Force, Air Force Materiel Command, Robins AFB, Georgia, v. FLRA and AFGE, 01-1497 (D.C.Cir.) On 11-20-01, Air Force filed petition for review of FLRA holding that an arbitrator, operating under the authority of a collective bargaining agreement, has the authority to consider a grievance filed by an employee that alleges a violation of the Privacy Act, 5 U.S.C. §552a, and that the arbitrator has the authority to award damages for a violation. AFGE intervened on 12-20-01. Court issued order 2-20-02 granting Air Force motion to dismiss.

Closed Major Administrative Cases **Councils**

C-45 (7g) Harrison v. Dept of Agriculture, (FMCS 01-0416-09241-A) Arbitrator selected for arbitration of 14 day suspension, coupled with reassignment to distant plant, for alleged prejudicial conduct to Agency. The case originated as a proposed removal with a possible last chance agreement for review, and involved issues of alleged threatening conduct, nexus issues involving plant employees, and questions regarding defects of investigation. Case settled with confidential settlement agreement and plaintiff's return to her plant of origin.

NATIONAL OFFICE CASES

ACTIVE 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 has completed review of the two outstanding plaintiffs' backpay discrepancies and has 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 has requested complete sets of calculations for each plaintiff. All plaintiffs have approved government's final backpay figures. GCO has sent list of attorneys' fees to government.

7(j) Mudge v. United States 02-5024 (Fed Cir) AFGE is participating 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 district 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's amicus brief filed 2-11-02. There are now three cases before the Federal Circuit that raise this issue. Briefing will be completed by 3-7-02.

Closed Court Cases **National Office**

*L-709 (7g) Department of Justice v. FLRA and AFGE Local 709 (intervenor), 00-1433 (DC Cir) Justice has again challenged availability of Weingarten rights in OIG investigations, alleging that the **SUPREME COURT** in NASA left open the issue of these rights in criminal investigations. The FLRA ruled that the **SUPREME COURT** did no such thing, and AFGE briefed the issue on the side of FLRA. Oral argument held 9-13-01. On 10-9-01, **Court affirmed FLRA's ruling, protecting union members' and employees' Weingarten rights in all IG investigations, including those of a criminal nature**.