AFGE

LEGAL RIGHTS FUND

Second 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 first quarterly report (March 5, to June 12, 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

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 long-standing 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. AF brief due 6-11-02, FLRA brief due 7-11-02, AFGE brief due 7-26-02, AFGE reply brief due 8-9-02. Oral argument set for 10-10-02.

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. Arbitrator on 4-2-02 indicated he will decide fee petition soon.

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. FLRA currently investigating the charge against the union.

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. 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 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 forwarded 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 due 7-29-02.

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 due 6-3-02. It is anticipated the case will be resolved on cross-motions for summary judgment in late 2002.

L-1923 (4) [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. The motion is pending and oral arguments are scheduled.

ACTIVE MAJOR ADMINISTRATIVE CASES **4th DISTRICT**

L-446 (7e) AFGE Local 446 and VA, Ashville, 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. GCO reviewing for appeal. Exceptions due 6-28-02.

CASES IN THE FIFTH DISTRICT

ACTIVE 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. AF brief filed 12-24-01, FLRA brief filed 2-1-02, AFGE brief filed 2-12-02. Oral argument heard presentations of AF and FLRA 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. 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, awaiting panel.

SIXTH DISTRICT

SEVENTH DISTRICT

EIGHTH DISTRICT

CASES IN THE NINTH DISTRICT

ACTIVE COURT CASES **9th DISTRICT**

L-916 (7) Transport Workers of America, Local 514, et al., v. Oklahoma, et al., 01-633-S (E.D. Ok) Suit filed 11-13-01 by six unions including Local 916 and Local 1358 (with approval 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 filed, court on 6-5-02 found that the applicable sections of the Oklahoma law are constitutional. AFL-CIO legal department, the lead counsel, is considering appeal.

*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 filed 3-8-02. AF reply brief filed 4-16-02, FLRA cross-reply brief filed 5-6-02. Oral argument to be scheduled.

CASES IN THE TENTH DISTRICT

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.

ELEVENTH DISTRICT

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. FLRA commenced investigation, last of four statements furnished 5-20-02. Pending.

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 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.

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 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.

C-33 (7e) James v. National Border Patrol Council 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 due 6-14-02.

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.** 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. 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 computer 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 unre

solved issues including compensation for comp time, additional back pay, and double damages. Local 1923 counsel is beginning fact-finding interviews of computer specialists in Information Technology branch in preparation for arbitration.

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. Meeting with arbitrator and agency scheduled for 7-02.

*(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, 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 60-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. GCO currently providing legal assistance to agency/union joint board deciding final cases.

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. **Parties have agreed on back pay and attorneys' fees.** Parties are attempting to resolve issue of how to handle payment to heirs of deceased plaintiffs.

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 completed 3-7-02, oral argument set for 7-11-02.