

# AFGE

## LEGAL RIGHTS FUND

### Second Quarter Report

by Agency

### 2003

*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 second quarterly report (April 24 to June 2, 2003). 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 First Quarterly Report. If there has been no changes in an existing case, reference must be made to the earlier Report. This current Report, per the instructions of the National Executive Council, simply provides the latest action taken on each case. Cases marked by an "\*" indicate decisions that AFGE won in significant areas.

## Department of Agriculture

### Administrative Cases

L-2935 (7j) Bixler v. Department of Agriculture, FSIS (MSPB PH-0752-02-0377-I-1) Food inspector was suspended for 30 days for allegedly sexually harassing a female employee of one of the plants he was assigned to inspect. The inspector denies the charges and alleges he is being charged because he wrote up this plant for numerous violations and stopped its production on several occasions. Appeal filed 10-1-02, trial held 3-21-03, decision 5-30-03 reversed suspension based on agency's failure to prove the charges. Motion for attorneys' fees pending.

## Department of Defense

### Court Cases

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. Brief completed 2-10-03. Oral argument 5-9-03. Decision pending.

### Administrative Cases

L-1827 (7a) National Imagery and Mapping Agency and Local 1827 (FLRA DE-RP-03-0010) On 1-28-03 NIMA's Director determined, pursuant to 10 U.S.C. §461(c)(1), that the positions in the agency's bargaining units ceased to be covered by bargaining agreements and the employees in those positions ceased to be entitled to representation by Local 1827. On 2-3-03, NIMA filed a clarification of unit petition with the FLRA, seeking to terminate AFGE's recognition. AFGE filed a response on 3-17-03, further proceedings pending.

L-2510 (7g) Local 2510 President 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. Arbitrator selected on 12-17-02; arbitration completed 5-28-03.

L-2510 (7g) Local 2510 President Roach v. DFAS AFGE on 12-18-02 filed request for information and prepared written reply to proposed removal for alleged failure to follow orders. Roach terminated on 2-3-03. AFGE filed for expedited arbitration. By decision dated 5-1-03, arbitrator set aside the removal and mitigated to 14 day suspension. Arbitrator refused to permit agency to rely on a prior pending suspension and Roach had remained on administrative leave for over two months.

L-3407 (7a) National Imagery and Mapping Agency and Local 1827 (FLRA DE-RP-03-0038) On

1-28-03 NIMA's Director determined, pursuant to 10 U.S.C. §461(c)(1), that the positions in the agency's bargaining units ceased to be covered by bargaining agreements and the employees in those positions ceased to be entitled to representation by Local 3407. On 2-3-03, NIMA filed a clarification of unit petition with the FLRA, seeking to terminate AFGE's recognition. AFGE filed a response on 3-17-03, further proceedings pending.

### **Closed Court Cases**

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 active 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). Oral argument 5-8-03. Decision 5-14-03 affirmed MSPB.

## **Department of Justice**

### **Administrative Cases**

L-83 (7e) BoP, Federal Correctional Institution, Federal Satellite Low, La Tuna, Texas and AFGE Local 83 (FLRA O-AR-3674) BoP filed exceptions 4-9-03 to arbitration award that found management at La Tuna had violated collective bargaining agreement by routinely vacating posts at institution. AFGE opposition to exceptions due 6-13-03.

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. Union opposition to agency exceptions filed 3-25-02. FLRA decision issued 1-28-03 granting agency's exceptions and holding that employees were not entitled to compensation from time that they first entered institution. FLRA held that it was premature to consider AFGE's exceptions. Case remanded to arbitrator to determine whether any pre- or post-shift duties worked by employees were compensable. AFGE filed motion for reconsideration with FLRA on 2-12-03 requesting that FLRA rule on AFGE's exception, contending that arbitrator should have applied FLSA statute of limitations rather than ruling that back pay ran only from the date of filing the grievance. In the meantime, the parties are negotiating the wording of a joint letter concerning the FLRA remand to the arbitrator on the issue of the amount of time employees should be compensated for pre- and post-shift activities.

L-919 (7e) USP Leavenworth and AFGE Local 919 (FLRA O-AR-3682) BoP filed exceptions 4-28-03 to arbitration award that ordered management to compensate employees at institution for time spent at the beginning and end of their shift picking up and dropping off keys and equipment at the Control Center. Agency argued that its actions had not violated the FLSA. AFGE opposition due 6-27-03.

### **Closed Court Cases**

L-922 (7f) U.S. Dept Justice, Federal Bureau of Prisons, FCI Forrest City, AR 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. Court ordered mediation pursued through 1-03 and determined unsuccessful in resolving case. Before briefing began, BoP voluntarily withdrew appeal through stipulation. Stipulation to dismiss filed 2-20-03, order of dismissal entered 2-24-03.

## **Department of Veterans Affairs**

### **Administrative Cases**

L-446 (7e) AFGE Local 446 and VA, Asheville, NC, (FLRA 0-AR-3568) 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. FLRA issued decision 3-4-03 ruling that arbitrator should have awarded interest and fees. VA is in process of calculating interest to be paid employees. Parties are negotiating over attorneys' fees. In absence of settlement, matter will be referred to the arbitrator.

L-1923 (7h) Social Security Administration, Baltimore, Maryland and American Federation Of Government Employees, Local 1923, AFL-CIO, WA-RP-90035 In 11-02, the FLRA invited all interested persons to file briefs as *amici curiae* addressing the significant question presented in this case, namely "whether, and how, the security work performed by the incumbents of the (1) Physical Security Specialist, GS-080-11 (Position Description #8B349 and (2) Physical Security Specialist, GS-080-11 (Position Description #8B356); and (3) Electronics Technician, GS-856-11 positions 'directly affects national security' as that phrase is defined in Dept of Energy, Oak Ridge Operations, Oak Ridge, Tenn., 4 FLRA 644, 655-56(1980)." See 67 Fed. Reg. 71175 (Nov. 29, 2002). AFGE timely submitted an *amicus* brief urging the FLRA to uphold the Regional Director's decision as being consistent with *Oak Ridge*.

Thereafter, the Department of Justice (DoJ) filed a brief, on behalf of the United States, arguing that the “national security” exclusion in 5 U.S.C. §7112(b)(6) should be expanded to include *any* security-related position, no matter how attenuated the relationship between the functions performed and national security. The government’s argument implicitly proposed that the FLRA revisit the *Oak Ridge* test so as to greatly expand the parameters of the national security exclusion. AFGE therefore thought it imperative that it submit a supplemental brief arguing that should the FLRA undertake such a review, then the Statute plainly dictates a tightening, rather than, expansion of the *Oak Ridge* test for excluding employees from collective bargaining on the grounds of national security.

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 file 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 Blue 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 filed 11-18-02. Arbitrator on 1-6-03 sustained removal. AFGE filed notice of appeal to EEOC. Blue brief to EEOC 2-28-03, VA filed brief 3-25-03, AFGE filed short rebuttal brief 3-28-03.

### Closed Administrative Cases

L-903 (7j) Dr. Gary Parker 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. On 12-24-02 Deputy Undersecretary for

Health granted motion for attorneys fees and awarded AFGE \$21,508 in fees and travel expenses.

## **Social Security Administration**

none

## **Transportation Security Administration**

### **Court Cases**

- (7h) AFGE v. Loy, 03-00043(RMC) AFGE filed suit 1-10-03 challenging directive issued by TSA administration excluding federal airport screeners from organizing for purposes of collective bargaining. On 4-4-03 TSA filed motion to dismiss, alleging court lacks subject matter jurisdiction and for failure to state a claim. AFGE on 5-9-03 filed opposition, decision pending.

## **Miscellaneous cases**

### **Court Cases**

- (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. Oral argument 3-7-03, decision pending.

### **Administrative Cases**

- 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. Parties arrived at stipulation of facts. Regional Director issued decision agreeing that newly created position occupied by former Human Resources Officer (who will resume that position in a few months) is outside the bargaining unit. Decision dismissed the ULP charge. Cochran filed decertification petition with showing of not less than

30%. AFGE on 5-15-03 filed request for hearing challenging his standing to file petition, the showing of interest, and whether there is a substantial and representative complement to proceed to hearing.

**Closed Administrative Cases**

L-1744 (7f) AFGE Local 1744 and Raytheon Technical Services, Inc., (FMCS 02-13894) 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 held on 11/21-22/02; adverse decision issued 2-26-03. No further action to be taken.