AFGE

LEGAL RIGHTS FUND

Second Quarterly Report

2001

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 1, to June 1, 2001, issued in conjunction with the NEC meeting the week of June 25). **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 Reports for the year.** 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.

CASES IN THE SECOND DISTRICT

None

CASES IN THE THIRD DISTRICT

ACTIVE 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. Matter pending decision.

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, awaiting decision on fees petition.

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 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.

CASES IN THE FOURTH DISTRICT

ACTIVE COURT CASES **4th DISTRICT**

L-1992 (7i)) Murray v. MSPB and DoD (intervenor), 01-3226 (Fed Cir) 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 decision of AJ. AFGE filed petition for review, decision pending.

L-2065 (7f) Brown v. Department of the Navy, 00-3003 (Fed. Cir.) In 83 M.S.P.R. 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 is 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. Government opposition due 5-29-01. AFGE reply filed 6-8-01, decision on petition for certiorari by Supreme Court expected 10-01.

CASES IN THE FIFTH DISTRICT

ACTIVE COURT CASES — 5th DISTRICT

L-1858 (7k) AFGE, et al. v. Cohen, 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.

ACTIVE MAJOR ADMINISTRATIVE CASES — 5th DISTRICT

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.

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 due 7-5-01.

SEVENTH DISTRICT

None

EIGHTH DISTRICT

None

CASES IN THE NINTH DISTRICT

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-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 seeks fees and costs related to efforts to compel payment. Pending.

Closed Court Cases **9th District**

*L-919 (7j) Raney v. Bureau of Prisons 97-3469, 98-3043 (Fed. Cir.) Local President, subjected to overt anti-union animus by management and put on home duty for one year, was subsequently removed. AFGE alleged retaliation for whistle-blowing and union activities and filing grievances and ULPs. Grievance filed 11-8-96, decision issued 7-25-97, finding management failed to prove any of the seven charges of discipline, and ordering reinstatement of LP and back pay. AFGE requested the arbitrator to revisit his award to include Back Pay Act remedies of overtime and attorneys' fees. Arbitrator's supplemental decision denied overtime pay, but granted attorneys' fees based on erroneous standard at a reduced rate.

Case thus presents the very important issue of whether AFGE attorneys can receive full market rate fee awards when successful before the MSPB. AFGE appealed to Federal Circuit on 9-15-97. **Court issued favorable decision 8-11-00, in which by a 7 to 5 vote the Court en banc held that AFGE staff attorneys can receive a market rate per hour attorneys fee award if the amount is paid into the AFGE Legal Representation Fund**. AFGE filed attorneys' fee petition 9-9-00 seeking the attorneys' fees expended in the Fed Cir. The court rejected the fee petition without analysis in a two-sentence opinion. AFGE filed a request for reconsideration with the court, and a renewed fee petition, based on the market rate, with the arbitrator. Court again rejected AFGE's fee petition without explanation; no appeal possible. AFGE filed a motion with the arbitrator on remand for the market rate attorney fees expended on the arbitration case. Arbitrator ruled in favor of AFGE, AFGE received $49,478.56 in 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. 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, and scheduled briefing for summary judgment. Brief due 8-6-01, hearing on 12-20-01.

ELEVENTH DISTRICT

None

TWELFTH DISTRICT

None

CASES IN THE FOURTEENTH DISTRICT

None

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 which 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. AFGE is revising discovery requests to prepare for dispositive motions.

*C-45 (7h) AFGE v. Glickman, 99-(DC Cir)(98-893 (D.D.C.)) 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. In 7-98, government filed motion to dismiss. On 9-23-99, court denied plaintiff's TRO, denied motion to dismiss, but granted defendant's motion for summary judgement, on grounds that statutes do not define inspection. Plaintiffs appealed on 9-27-99 and sought emergency relief from the D.C. Circuit. Court denied request for preliminary injunction and docketed case for further proceedings. Court 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 put one inspector at end of poultry line and two inspectors in several plants. USDA moved in district court for declaration that the program meets statutory requirements. Subsequently, parties filed updates with the Court regarding status of project. Court issued order declaring slaughter model project lawful. AFGE appealed. Brief due

9-26-01, oral argument scheduled for 1-11-02.

ACTIVE MAJOR ADMINISTRATIVE CASES **COUNCILS**

C-45 (7g) Harrison v. Dept. of Agriculture, (FMCS 01-0416-09241-A) Arbitrator selected and dated to be scheduled 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 involves issues of alleged threatening conduct, nexus issues involving plant employees, and questions regarding defects of investigation.

*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. DVA is preparing settlement proposal based on recent arbitration decision concerning computer specialists. VBA provided AFGE with a list of positions in VBA that currently are classified as exempt on 6-17-96. AFGE is conducting review of these positions to determine if they are properly classified as FLSA exempt. AFGE is working with Council to interview selected computer specialists about their job duties in preparation for settlement discussions and/or arbitration. **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 also is reviewing arbitration award received by former NFFE Local 1745 that held that GS-12 Computer Specialists were non-exempt but that GS-13 Specialists were exempt.

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.

*(7d) SSA FLSA arbitration 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.

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 has 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.** Parties discussing the amount of back pay due to each plaintiff. 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 has 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.

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 OIC 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 will brief the issue (and perhaps argue) on the side of FLRA. Petitioner's brief due 5-15-01, AFGE intervenor's brief due 6-29-01, oral argument scheduled for 9-13-01.

Closed Court Cases **National Office**

*(4a) Pollard v. DuPont, (Supreme Court) AFGE joined Amici Curiae brief in U.S. Supreme Court, 2-22-01 on behalf of sexual harassment victim denied front pay because she had already received the full $300,000 compensatory damages. AFGE and civil rights organizations argued that front pay is an equitable remedy not subject to the $300,000 "cap" in damages made available in the 1991 Civil Rights Act. By decision dated 6-4-01, the Supreme Court unanimously agreed, and reversed the decision of the Sixth Circuit. This decision insures that federal employees can receive a full $300,000 in compensatory damages, plus back pay, front pay, and attorney's fees for intentional

civil rights violations.