AFGE

LEGAL RIGHTS FUND

First 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 first quarterly report (January 1 to April 24, 2003). Cases marked by an "*" indicate decisions that AFGE won in significant areas.

Department of Agriculture

Administrative Cases

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. Still pending on 1-14-03.

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. Awaiting decision.

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 not yet calendared.

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). Opening brief filed 11-20-02, reply brief filed 1-31-03. Oral argument scheduled for 5-8-03.

L-2263 (7h) AFGE, et al., v. United States, et al., 02-5142 (DC Cir.) 00936 (D.D.C.)(RMU) On 5-1-00, plaintiffs filed complaint and motion for TRO seeking to enjoin provisions of DoD appropriations law exempting majority-owned Native-American firms from competitive contracting requirements (such as the cost comparison mandated by

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

Administrative Cases

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

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 set for 4-8-03, and to be completed at a later date.

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, which was rescheduled for 3-19-03 and to be completed 4-24-03.

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

Closed Cases

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 witness interviews 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. Air Force opposed on 8-23-01, FLRA filed reply 8-29-01. Order of Court on 11-26-01 deferred dismissal issue to panel, and ordered briefing on merits. FLRA and AFGE briefs filed 3-8-02. Court issued decision on 11-4-02 in FLRA and AFGE's favor on procedural grounds (Air Force's improper filing with FLRA). No further review sought by Air Force.

*L-1709 (7f) Dept of Air Force, 436th Airlift Wing, Dover AFB, Dover, DE v. FLRA and AFGE Local 1709, 01-1373 (D.C. 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 DC 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. Oral argument held on 10-10-02. **In favorable and precedential decision issued 1-11-03, the Court held that union's right to attend "formal discussion" includes right to attend mediation sessions on formal EEO complaints**. Deadline for AF appeal was 4-17-03, no petition for certiorari filed.

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, challenged 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 asked 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 nu

merous legal defenses but admitting most of the factual allegations. AFGE requested limited discovery (interrogatories and request for production of documents). In response, the government moved for a protective order and on 8-20-01 filed a motion to dismiss. AFGE response filed 9-17-01. Court, without argument, granted defendants' motion to dismiss at status conference on 9-29-01. After AFGE filed its notice of appeal 11-20-01, the government moved for summary affirmance, which the DC Cir denied on 3-13-02. On 10-4-02, AFGE filed its brief on the subject matter jurisdiction question; oral argument held 1-17-03. Decision on 2-21-03 held that appellants lacked precedential standing and affirmed the lower court's dismissal. Case closed.

Department of Justice

Court Cases

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

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.

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, AFGE 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. Parties filed pre-trial orders 11-30-01. Court issued decision 3-15-02 dismissing the case on theory that the CSRA prohibits court litigation on FLSA claims that can be raised in arbitration. AFGE filed appeal to Federal Circuit 5-9-02. Court issued order 8-19-02 staying further proceedings in this case until two related cases, Mudge v. U.S. 02-5024 (Fed. Cir.) (see below under National Office), and O'Connor v. U.S. 02-0526 (Fed. Cir.) were decided. Decisions in Mudge and O'Connor issued 10-17-02. Government filed motion 1-13-03 for rehearing en banc in Mudge and O'Connor. Parties will file motion for continuation of stay pending until Court rules on requests for rehearing en banc.

C-83 (7e) James v. Dale, Misc. Dkt. No. 700 (Fed. Cir.) OPM filed petition for review 4-19-02 appealing arbitration award that reversed the discharge of a Border Patrol agent in Local 2366 for allegedly associating with a known or suspected narcotics law violator. Arbitrator had found that the agent did not know that the individual was a known violator. AFGE opposition to petition for review filed 6-14-02. Court granted OPM's petition for review 10-2-02. AFGE brief filed 4-11-03.

Administrative Cases

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.

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-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 and awarded to and received by AFGE 8-01**. Met with arbitrator and agency in 2-02. Additional information sought from claimants in 5-02. Met with arbitrator on 8-14-02. Arbitration award 12-14-02 concerning attorneys' fees and timing of future procedures. Conference call with arbitrator on 1-17-03.

Department of Veterans Affairs

Court Cases

L-446 (7f) AFGE Local 446 v. Principi, Secretary of Veterans Affairs and Roswell, VA Under Secretary for Health, 1:02-CV-613 (D.D.C.) Arbitrator ruled that registered nurses represented by the local were wrongfully deprived of evening and weekend differential pay. The VAMC employing the registered nurses failed to file exceptions to the award with the FLRA, thereby making the award "final and binding." Nevertheless, during the course of unfair labor practice proceedings to enforce the award, the VA Under Secretary for Health issued a 38 U.S.C. §7422 ruling that the underlying issue was not lawfully subject to the negotiated grievance procedure. Based on this belated ruling, the FLRA pursuant to §7422(d) declined to exercise jurisdiction to enforce the award (57 FLRA No. 137). AFGE filed suit 4-1-02 on the theories that (a) the VA Under Secretary lacks 38 U.S.C. 7422 authority to void a "final and binding" award; (b) the Under Secretary's authority under §7422 does not extend to grievances seeking compliance with existing standards; (c) the Secretary's belated use of her §7422 authority after a final and binding arbitration award is a

denial of substantive due process in violation of the Fifth Amendment; and (d) in voiding the award, she misapplied the provisions (§7422(b) and (c)) applicable to night and weekend differential pay for VA registered nurses. Government answer to complaint filed 6-3-02. AFGE motion for summary judgment and supporting brief and papers filed 8-29-02. AFGE cross-opposition and reply brief filed 10-30-02, awaiting decision on summary judgment motions.

L-2152 (7f) AFGE Local 2152 and Savlov v. Principi and Roswell, CV-N-02-0379 (D.Nev.) A VA physician represented by the local filed a grievance under the collective bargaining agreement alleging unlawful age discrimination, after the agency took away surgical duties from the physician that resulted in a loss of physician specialty pay. Before the grievance could be submitted to arbitration, on 5-5-02 the VA Under Secretary for Health issued a 38 U.S.C. §7422(d) determination that the issue was excluded from the grievance procedure by operation of §7422(b)(1) and (3). AFGE filed suit against the agency on the basis that the VA lacks authority under §7422(d) to exclude a grievance by a VA medical professional when that grievance alleges unlawful intentional discrimination. Complaint filed 7-15-02, AFGE opposition filed 10-10-02. Awaiting decision on VA motion to dismiss. Court scheduled oral argument for 7-11-03. Assuming the court denies the pending motion to dismiss, AFGE anticipates that the case will be decided on cross-motions for summary judgment, that a briefing schedule will be set for completion, and a decision issued shortly thereafter.

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

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. Pending.

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

professional reputation. Depositions were conducted and the discovery period has been extended so that more depositions can be scheduled.

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.

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 met 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 imposed a five-day suspension, based on false charges, on the President of an AFGE Local that represents only Title 38 employees. AFGE provided representation to the LP before a statutory Disciplinary Appeals Board. Hearing held week of 1-29-02. **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.

L-490 (7j) Local 490 v. Veterans Benefit Administration AFGE representing a Rating Claims Examiner who received a proposal to remove based on alleged failure to meet a newly adopted production standard that had become a critical element during his

PIP. AFGE's response attacked the new production standard in detail point by point as illegal. Decision received 1-8-03. Agency decided not to remove employee. Instead, he was downgraded from a GS-12 to a GS-10. Case transferred to Women's Department 1-15-03.

*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. AFGE and DVA agreed to review the contended exempt positions to explore settlement. **Parties executed settlement agreement 8-24-94 for employees of Veterans Benefits Administration (VBA), which guaranteed six years back pay to employees who had been wrongly classified as FLSA exempt. On 8-18-00 AFGE and VA entered into settlement that changed all AFGE bargaining unit computer specialists in the Veterans Benefit Administration to non-exempt, with back pay from 10-25-91 to 1-7-95, and double damages from 1-8-95 to 7-17-00.** The parties continued to negotiate unresolved issues of compensation for comp time, additional back pay, and double damages and other positions in VBA and VHA. **VHA changed all GS-11 334 computer specialists to non-exempt effective 12-8-00, and paid them back pay to 1-22-95**. AFGE asserted that this back pay is insufficient, and pursued further compensation for these employees. AFGE filed exceptions 6-22-01 to arbitration award received by former NFFE Local 1745, which held that GS-12 Computer Specialists were non-exempt but that GS-13 Specialists were exempt. Exceptions denied by FLRA 5-7-02. VA announced intention to conduct "depositions" of Computer Specialists in Information Technology branch in DC. AFGE 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 continue to negotiate unresolved issues including compensation for comp time, additional back pay, and double damages. Local 1923 counsel began fact-finding interviews of computer specialists in Information Technology branch in preparation for arbitration. Arbitration on back pay period and additional payment of liquidated damages or interest for Computer Specialists at VBA held 10-22-02. Arbitrator issued decision 2-16-03 holding that it was not necessary to issue decision in favor of union, because at arbitration hearing the agency stated it would pay the affected employees additional liquidated damages so that the grievants would receive a full two years of back pay and liquidated damages. The **Computer Specialists in the VBA will be receiving a check for the additional liquidated damages** in the near future.

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.

Social Security Administration

Closed Administrative Cases

*(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. AFGE filed ULP complaints to enforce and increase the SSA's payments. 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 met in Baltimore for several months working on specific Suffer or Permitted issues. AFGE submitted interim attorneys' fees demand for $23,000 6-6-01. AFGE successfully litigated the collection of $433,000 in attorney fees. **Total payment to the AFGE bargaining unit has been in excess of $200,000,000! to over 40,000 AFGE bargaining unit employees.**

Transportation Security Administration

Court Cases

(7h) AFGE v. Loy, 03-00043(RMC) AFGE filed suit 1-10-03 challenging directive is

sued by TSA administration excluding federal airport screeners from organizing for purposes of collective bargaining. Dispositive motions to be filed.

Administrative Cases

Local 1 (7h) TSA v. FLRA, BN-RP-030008 and WA-RP-0023. AFGE filed representative petitions seeking exclusive representative status for airport screeners. TSA asked FLRA to dismiss petition on jurisdictional grounds, citing agency order excluding screeners from collective bargaining. AFGE filed brief opposing agency. FLRA ordered additional briefing due 3-17-03.

Miscellaneous cases

Court Cases

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

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

7(j) Mudge v. United States 02-5024 (Fed Cir) AFGE participated as amicus curia in support of plaintiff. District court ruled that plaintiff, who was covered by a collective bargaining agreement, could not bring his pay claims to federal court, because the grievance/arbitration mechanism was his sole avenue by which to seek relief. The 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 filed a detailed amicus brief in the Fed Circuit because of our high level of interest in this matter 2-11-02. There were three cases before the Federal Circuit that raised this issue. Briefing completed 3-7-02, oral argument held 7-11-02. **Favorable decision issued** 10-17-02. Court held that the word "administrative" that was added in 1994 overrules Carter, in that, while the grievance arbitration mechanism may be the exclusive administrative route for our bargaining unit employees to assert their rights under federal pay statutes, they still retain their rights to litigate these matters in federal court. **This decision will have a significant and broad ranging positive impact by insuring that federal employees who are covered by a collective bargaining agreement are not stripped of their rights to litigate important pay and other issues in federal court like any other citizen.** Government timely filed a motion for rehearing and rehearing en banc 12-27-02. That motion was denied 2-10-03.

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. Further action under current active review.

Closed 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.