AFGE

LEGAL RIGHTS FUND

First 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 first quarterly report (January 1, 2001, issued in conjunction with the meeting of the NEC, to April 5, 2001).

CASES IN THE SECOND DISTRICT

ACTIVE MAJOR ADMINISTRATIVE CASES — 2nd DISTRICT

L-2143 (7i) AFGE Local 2143 and Department of Veterans Affairs, Office of the Inspector General (BN-CA-01-0120) The OIG filed a complaint in state trial court against the Local Vice President alleging violations of state criminal law statutes. GCO requested the OIG to investigate the complaint. OIG refused to withdraw the complaint and responded that filing the complaint was within the scope of the Inspector General's authority. AFGE filed a complaint with the President's Committee on Integrity and Efficiency to investigate the VA OIG. PCIE found no violations. AFGE filed unfair labor practice charge with FLRA. OIG subsequently filed another criminal complaint against same local official, alleging different criminal statute violations. AFGE amended ULP charge to reflect second criminal complaint and filed another complaint with the PCIE. Criminal complaint, ULP charge, and PCIE complaint are currently pending.

Closed Court Cases — 2nd District

L-1164 (7j) AFGE Local 1164 v. Department of HHS and SSA 98-11321-PBS (D.Mass.) Local sought under the Freedom of Information Act a copy of the draft report made by an air quality inspector at a SSA field office. Agency claimed only the final, not draft, report was available under FOIA. Union believed final report omitted key facts. AFGE filed a complaint in district court for the draft report on 7-1-98, arguing the issue that draft reports of site visits are available under FOIA. Agency provided additional documents and rough notes of inspector and Vaughn index, but did not turned over various documents including two drafts of report. Union filed a Rule 56(f) motion for discovery, which was denied. The case raised the important issue of whether the union can get all documentation regarding an agency industrial hygienist's site visit under the FOIA. Negative decision received 8-26-99. Judge claimed he examined documents in chambers and there was nothing in them inconsistent with what was released to union. He did not order the documents released to the union. AFGE appealed to 1st Circuit on 10-4-99. Negative decision received 5-18-00, in which the court concluded, without any meaningful analysis, that the withheld six documents were "pre-decisional" and "deliberative" in nature and thus exempt under FOIA.

Closed Major Administrative Cases — 2nd District

L-400 (7e) King v. Department of Army (Ft Drum) (MSPB NY-1221-97-0376-W-1) The agency took clinical privileges away from a licensed social worker, who is a bargaining unit member, and conducted a credentialing hearing 10-22-93. The agency internal appeal system affirmed the agency's decision to remove certain clinical privileges from the employee, who retained his position in social work field and received full pay and benefits. The Local filed with the Office of Special Counsel, which accepted the case for investigation and assigned a prosecutor. The OSC on 3-3-97 decided it would take no action on behalf of the employee; AFGE filed an individual right of action appeal with MSPB. MSPB administrative judge issued initial decision 6-22-g9 in which she dismissed the case without prejudice in order to give King the opportunity to refile the appeal and address two cases relating to

the issue of jurisdiction. AFGE filed petition for review with MSPB 7-27-99, asserting that appellant had already adequately addressed the issue of jurisdiction and requesting that MSPB rather than administrative judge render a decision on the merits in case. Army filed response 8-12-g9 asserting that case should be dismissed because King had not made disclosures which qualified as whistleblowing and because the decredentialing action was not a covered action under the WPA. MSPB issued decision 10-28-g9 denying appellant's request for relief, but ruling that the petition for review constituted notice that King was refiling an appeal with administrative judge. Case remanded to AJ. AJ issued decision 3-7-00 finding that management's action did not violate WPA because the agency demonstrated that it would have taken the same action in the absence of King's whistleblowing activity. Petition for review to MSPB filed 5-2-00. MSPB denied petition for review 10-5-00.

CASES IN THE THIRD DISTRICT

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, 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 set for 4-9-01.

CASES IN THE FOURTH DISTRICT

ACTIVE COURT CASES **4th DISTRICT**

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 4-27-01.

Closed Major Administrative Cases **4th District**

L-2344 (7e) AFGE Local 2344 and VA Medical Center Huntington. West Virginia (FLRA O-AR3293) VA filed exceptions to arbitration award ordering VAMC to allow police officers ten minutes pre- and post- shift to change uniforms. AFGE filed opposition to exceptions 5-18-00, arguing that award was consistent with private sector regulations implement the FLSA and did not violate management's right to assign work or determine internal security. FLRA issued decision 12-20-00 setting aside award as contrary to law, relying on U.S. Department of Air Force v. FLRA, 952 F.2d 446 (DC Cir 1991), which held that the OPM regulation, 5 CFR §551.412(b), precludes collective bargaining to provide compensation for pre- and post-liminary activities that would otherwise be noncompensable.

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 pending.

ACTIVE MAJOR ADMINISTRATIVE CASES **5th DISTRICT**

L-1045 (7e) DVA, Gulf Coast System Veterans Health Care System and AFGE Local 1045 (FLRA) AT-CA-00001) A VA physician and union officer's physician specialty pay was cut in half because he was on 50% official time. Local 1045 filed a ULP and the FLRA Regional Director refused to issue a complaint on the basis that provisions of Title 38 divest the FLRA

of jurisdiction over the matter. Regional Director subsequently rescinded his letter and issued complaint against VA 8-25-00 alleging that the reduction of the physician's specialty pay violated 5 U.S.C. §7116(a)(1) and (2). VA filed answer 9-1800, alleging lack of jurisdiction and other defenses. VA Under Secretary for Health issued determination 1-23-01 stating that the matters at issue in the complaint concerned matters arising out of professional conduct or competence, peer review, or the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. §7422, and were outside the scope of collective bargaining. Based on this letter, the FLRA Regional Director withdrew the complaint and dismissed the ULP charge. Appeal to FLRA General Counsel due 4-11-01.

Closed Court Cases **5th District**

L-131 (7g) Leonard v. Department of Veterans Affairs (Fed. Cir.) (MSPB AT-0831-g7-0292-1) AFGE filed a petition for special law enforcement retirement coverage under the CSRS for a Tuscaloosa DVA police officer. On 6-26-97 judge issued initial decision remanding case to the agency for further consideration of relevant issues. VA denied coverage, appeal filed to judge on 3-2-98. AJ issued initial decision on 9-22-98 denying law enforcement retirement coverage. On 10-13-98 AFGE petitioned to full Board for review. On 4-22-99, Board declined to consider petition for review. Filed petition for review to Federal Circuit on 6-21-99. Case consolidated with Brooks v. VA (infra) for oral argument scheduled for 6-7-00. By order 6-12-00 the Court in a one word decision affirmed the MSPB decision, denying retirement coverage for VA police officers in Tuscaloosa. While the disposition provides that it is not citable as precedent, consolidated with Brooks (Dublin VA) and Tyrell (Richmond VA), it does not bode well for other VAs.

*L-987 (7g) Martin v. Department of Air Force 98-3401 (Fed. Cir.) On 9-25-98, AFGE filed petition for review of MSPB decision denying back pay to plaintiff following his reinstatement, because he supposedly was not ready, willing, and able to work due to a work related injury he suffered while performing replacement work before his return to federal employment. On 7-30-99, Federal Circuit reversed the MSPB, ordered that the plaintiff be made whole, and remanded the case to MSPB to determine the amount of back pay. Air Force agreed to full back pay and interest totaling $13,000. Motion for attorneys' fees and related expenses granted 9-8-00. AFGE wrote Justice Dept 9-12-00 requesting fees and expenses under market rate analysis. GCO received a check for attorneys' fees 215-01.

L-1985 (7g) Brooks v. Department of Veterans Affairs (Fed. Cir.)(MSPB AT-0831-96-0769-I-1, reissued as AT-0842-99-0308-I-1) AFGE entered an appearance on behalf of a Dublin, Georgia, VA police officer's claim of coverage under special law enforcement retirement provisions under FERS. On 6-25-97 judge dismissed appeal upon motion of VA, after VA rescinded its final decision, indicating VA Headquarters would reissue a new decision, at which time AFGE could refile its appeal. Judge instituted new appeal on 327-98. VA withdrew decision over objection, when judge advised the decision was not issued by the agency head as required by regulation. As no new decision by VA was forthcoming, AFGE filed motion to reinstate appeal on 1-21-99. Adverse decision issued 8-30-99. Petition for review filed to Federal Circuit on 10-16-99. Case consolidated with Leonard v. VA (supra) for oral argument 6-7-00. On 6-12-00, Court issued one word decision affirming the MSPB denial of coverage for VA police officers. See Leonard.

L-3936 (7g) AFGE Local 3936 and Puerto Rico National Guard (1st Cir) (FLRA BN-CA-90241) On 2-3-99 AFGE filed a ULP charge and request for temporary restraining order re the National Guard's placement of about 30 dual technicians in a non-duty pay status, suspension of security clearances, and denial of access to the base, for engaging in informational picketing. Local counsel Maldorado retained to assist in responding to the proposed removal of LP Romero. FLRA issued a complaint, and hearing conducted 4-7-99. Bench decision found pervasive ULPs, and recommended order rescinding all letters affecting their status and preventing further retaliation. PRNG filed exceptions on 5-1599. FLRA Regional Director sought injunctive relief in the district court. Court denied injunction on 10-8-99, and dismissed case. AFGE filed motion for expedited decision on exceptions to FLRA on 10-12-99. Decision from FLRA issued 3-21-00, finding that PRNG engaged in a series of ULPs, and cancelled indefinite suspensions and revocation of security clearances. FLRA refused to set aside terminations based on its interpretation of statute providing no appeal of decision of Adjutant General. AFGE filed appeal to 1st Circuit. PRNG complied with most aspects of FLRA 9-15-00 order, although some compliance issues outstanding. Sole issue at 1st Cir is authority of FLRA to redress terminations. On 2-6-01, 1st Circuit issued its decision affirming the FLRA's asserted inability to redress technician terminations. The Court recognized that this absence of relief for retaliatory discharges leaves unidentifiable meaningful rights that Congress provides under the LMRDA, but the Court suggested it is for Congress to correct the injustice. Local 3936 is pursuing reinstatement through commitments made by a new administration.

Closed Major Administrative Cases **5th District**

L-1145 (7g) AFGE Local 1145 and Anniston Army Depot (EDP for exposure to cadmium) AFGE is working closely with the Local to win environmental differential pay for welders and other WG employees for exposure to cadmium. On 5-19-00 Local entered into settlement whereby 200-300 employees will be receiving a total of $1,725,000 in EDP.

L-1976 (7g) Brittain v. VA (SPB AT-0752-00-0410-I-1) MSPB appeal filed 3-4-00 of a downgrade of a police officer/former union steward accused of surreptitiously copying union files and of conduct unbecoming a police officer. Motion filed to hold case in abeyance pending a ruling of the FLRA, which conducted a six day hearing into the matters surrounding this incident. Settlement entered into 9-7-00, canceling demotion, placing plaintiff in another position with training at same grade with greater upward mobility, paying him $33,000, posting notice of VA misconduct, and awarding attorneys' fees of $9,000.

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 pending.

SEVENTH DISTRICT

ACTIVE COURT CASES **7th DISTRICT**

*L-2119 (7f) AFGE Local 2119, et al. v. Cohen, et al., 97-4020 (C.D.Ill.), 00-3512 (7th Cir) Suit filed 3-5-97. Local and eleven members challenge Department of Army's military procurement and industrial policies to contract out weapons production instead of producing supplies at the Rock Island Arsenal. Suit alleges "wrongful privatization" as a violation of Arsenal Act, BRAC, military procurement laws, and the Administrative Procedures Act. AFGE seeks declaratory and injunctive relief. Government motion to dismiss filed 9-5-97, decision 2-3-98 dismissed case based on lack of standing. Appeal filed 3-2-98. The **7th Circuit Court decision issued 3-18-99 in AFGE's favor in part**, holding that employees have standing to sue over contracting done in violation of Arsenal Act. Case remanded to district court for further proceedings. Per AFGE action, Government ordered to produce an administrative record, and, in 11-99, produced over 4,000 pages of documents. After review by AFGE, court established a schedule for summary judgment motions. Unfavorable district court decision issued 8-23-00. AFGE filed appeal 9-22-00, filed brief 11-7-00, oral argument held 3-28-01. Decision pending.

EIGHTH DISTRICT

None

CASES IN THE NINTH DISTRICT

ACTIVE 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, arbitration invoked 12-13-96. 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. Fed Cir on 1-12-99 sua sponte ordered a hearing en banc, where all 11 judges on the Circuit heard and decided the case.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, awaiting payment from BoP.

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 pending the meeting.

L-903 (7j) Dr. G.P. v. Department of Veterans Affairs, VA hospital in Missouri has imposed a five-day suspension, based on false charges, on the President of an AFGE Local that represents only Title 38 employees. GCO is providing representation to the LP before a statutory Disciplinary Appeals Board. Hearing to be scheduled.

Closed Major Administrative Cases **9th District**

*L-903 (7f) Harry S. Truman Memorial Veterans Hospital. Columbia, Missouri. and AFGE Local 903 (FLRA DE-CA-80037) A VA physician, President of the Local, was awarded $3,000/annum less in physician specialty pay than similarly situated physician specialists, because part of his duty time is devoted to union representational activities on official time. On a ULP filed by the Local over the disparity in pay based on union activities, the FLRA Regional Director refused to issue a complaint, based on a premise that the FLRA is precluded from exercising jurisdiction by operation of Title 38 U.S.C. provisions. AFGE filed an appeal with the FLRA GC 5-5-98. Decision of the FLRA GC granted AFGE's appeal, case sent to FLRA Region for further handling. FLRA Region issued dismissal letter 7-28-00. AFGE appealed to FLRA GC 9-12-00; adverse decision issued 1-26-01.

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 ex-

empting 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. Pending.

ACTIVE MAJOR ADMINISTRATIVE CASES **10th DISTRICT**

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

ELEVENTH DISTRICT

None

TWELFTH DISTRICT

ACTIVE MAJOR ADMINISTRATIVE CASES **12th DISTRICT**

(7j) AFGE v. Barstow DLA and United States, 00-130C (Ct Fed Claims) With the assistance of local counsel highly specialized in federal contract law, AFGE requested that the award of a DLA warehousing function at Barstow to EG&G, a private contractor, be reversed, because the MEO was actually the low bidder. In a decision issued 5-10-00, the court concluded that the union did not have standing to challenge an A-76 contract award under the FAIR Act. Appeal filed in Fed Cir, seeking to convince the Court that the lower court should have found that the federal employees and AFGE did have "prudential" or "zone of interest" standing to challenge an illegal A-76 contract award. Case has been fully briefed, oral argument held on 4-6-01. This case has taken on an even greater significance since as of 1-1-01 all contract claims must be filed in the U.S. Court of Federal Claims, pursuant to 28 U.S.C. §1491(b). Now awaiting decision.

Closed Major Administrative Cases **9th District**

L-1305 (7f) In Re: Amfac Resorts, Grand Canyon National Park. Arizona, Contract No. GCGRCA001-

69 (formerly 14-10-9-900-158), No. 98-156 (DoL Admin. Rev. Bd.) Local represents bus drivers employed by a government contractor performing transportation and concession services at Grand Canyon National Park. The Park Service and Employer claimed that, because of an exemption to Service Contract Act ("SCA") coverage for work under government "concession" contracts, the drivers were not entitled to SCA mandated levels of wages and fringe benefits. Local filed complaint with DoL Wage and Hour Division which held that SCA wages and benefits should be paid to the bus drivers. Employer appealed this ruling to the Administrative Review Board ("ARB") within DoL per 29 C.F.R. §8.7. AFGE represented Local 1305 in ARB proceedings. DoL filed motion to remand to Wage and Hour 9-22-98. ARB granted remand to Wage and Hour 10-20-98. AFGE recently learned that because the SCA will not impose wage standards where wages are negotiated, and because Local negotiated wages with the contractor, Wage and Hour suspended consideration. AFGE considered a request to reopen for review of back pay issue and for ruling on SCA coverage, but reopening not possible when Union signed with company at same rate of compensation provided in absence of SCA wage determinations.

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. Pending.

(7h) AFGE v. District of Columbia, 96-1717 (D.D.C.) on removal from 95-CA-001934 (DC Superior Ct) AFGE and its District locals filed suit on 3-9-95 challenging the City Council's enactment of legislation imposing a ten day furlough and 12% reduction in union wages for 1995. The unions contended that the cuts unconstitutionally impair the collective bargaining agreement between the unions and the City. The pay cut was scheduled to go into effect on 4-2-95, and AFGE moved for a preliminary injunction. On 3-29-95, the City and unions reached an MOU whereby employees agreed to a 6% pay cut, four additional furlough days, and certain changes in overtime calculations for FY 1995. Although the City Council finally approved the MOU, it unilaterally changed the effective date of the agreement to 4-30-95, thus allowing the 12% pay cut to go into effect for two two-week pay periods in April. Plaintiffs pursued summary judgment on the basis of the contract impairment arising out of the legislatively mandated cut for these two pay periods, and filed a motion for summary judgment on 6-2-95. On 4-25-96, Congress enacted an appropriations bill that expressly ratified Council's action. Plaintiffs amended the complaint to challenge federal appropriations law. United States, as defendant, removed case to federal district

court and moved to dismiss. District of Columbia also moved to dismiss. AFGE opposed these motions and moved for summary judgment. Under court ordered mediation, the City and unions agreed to settle for $950,000 in back pay. The Control Board approved the settlement agreement on 2-18-98. On 10-19-98, the union notified the District that it had completed its review of the list of qualified employees and submitted changes. DC Government issued payments by 6-6-99. Parties are still attempting to identify individuals wrongfully excluded from the payout.

Closed Court Cases **14th District**

L-476 (7x) O'Neill v. HUD, 99-3293 (Fed. Cir.) Appeal from MSPB decision upholding discharge of GS-6 clerk on various charges. The Board found O'Neill guilty of violating a criminal conflict of interest law by urging HUD to make surplus military housing available to the homeless, and federal ethics regulations by receiving one telephone call and three electronic mail message, and sending four electronic mail messages through agency equipment. The Board expressly found that there is no de minimis exception to the rule against using government equipment for non-governmental purposes. The Board also found O'Neill guilty of a six hour delay in completing an assignment, and of being insolent to her supervisor. On 8-8-00, Court ruled that plaintiff was not guilty of violating the conflict of interest law, but that her discharge nevertheless would be upheld on the basis of the insolence charge.

(7h) AFGE, et al. v. D.C. Financial Responsibility and Management Assistance Authority, 97-807JP (D.D.C.) AFGE on 4-21-97 challenged the resolution and order of the D.C. Financial Control Board changing the contractual formula for calculation of FLSA overtime to exclude time in a pay, non-work, status, in violation of union contracts and the Comprehensive Merit Personnel Act. Unions filed motions on 7-3-97 for summary judgment, seeking compensatory, declaratory and injunctive relief. On 10-6-99, Judge ordered the Control Board to address a decision of the D.C. Circuit holding that the Control Board was not authorized to abrogate contracts. The Control Board filed a response and proposed to settle by rescinding the order. Settlement discussion terminated after the District refused to restore the status quo. Court issued order 9-22-00 declaring the order unlawful and directing the District to come into full compliance with the collective bargaining agreement. Defendants moved to alter judgment on grounds that Board's enabling statute precludes the court form enjoining the Board pending exhaustion of all appeals. Plaintiffs opposed the motion. Subsequently, Congress enacted appropriations for D.C. that included a provision expressly ratifying the Control Board's order. Defendants moved to dismiss on grounds of mootness, and plaintiffs opposed. Court vacated its previous order and dismissed the case in light of Congressional action.

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.

*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 and the matter awaits a briefing schedule..

ACTIVE MAJOR ADMINISTRATIVE CASES **COUNCILS**

C-33 (7e) Council 33 and Bureau of Prisons Council 33 filed grievance over BoP's failure to compensate employees for performing pre- and post-shift duties. AFGE sent settlement offer to BoP 3-12-99. AFGE informed BoP that figures used for minutes engaged in pre- shift duties and number of days worked per year were too low. Agency agreed to provide the documents upon which these calculations were based. **BoP and Council 33 entered into settlement agreement 8-10-00 compensating all employees for pre- and post-shift duties who were in bargaining unit between 5-17-89 and 1-1-96.** Amount of payment de-

pends on length of time in unit. Most grievants have been paid. Parties are reviewing records to determine if there are other grievants who have not been paid.

*C-53 (7e) National Veterans Affairs Council and Department of Veterans Affairs (FMCS 94-14797) Council 53 filed a grievance 10-25-93 asserting that employees throughout the Department were wrongly classified as FLSA exempt. DVA denied the grievance, and the Council requested a panel of arbitrators. AFGE and DVA agreed to review the contended exempt positions to explore settlement. **Parties executed settlement agreement 8-24-94 for employees of Veterans Benefits Administration (VBA), which guaranteed six years back pay to employees who had been wrongly classified as FLSA exempt.** VBA on 6-17-96 provided AFGE with a list of positions classified as exempt. 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.

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

C-73 (d) National Council of Field Labor Locals v. Department of Labor (ARB-MSHA-08-00-046) AFGE is representing MSHA Local 3416 in arbitration concerning the dismissal of a member mine inspector accused of violating confidentiality regulations. Arbitration hearing held 3/6-3/8-01. Post-hearing brief due 4-9-01.

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. Arbitrator ordered mediation, pending.

*(7d) SSA FLSA arbitration This case involved a major attack by AFGE's General Committee and General Counsel's Office on the SSA's overtime pay policies. We have challenged SSA's position that numerous AFGE bargaining unit positions are exempt from the provisions of the Fair Labor Standards Act. **In a series of five arbitration decisions, the AFGE has been successful in obtaining over $151,300,000 (to date) for over 45,000 AFGE bargaining unit employees, in essentially all of our bargaining unit positions** (with the exception of several OGC attorneys). The Union has successfully arbitrated three decisions and successfully defended these decisions in three FLRA decisions found at 44 FLRA No. 66; 47 FLRA No. 78; and 49 FLRA No. 40. Further, the AFGE has filed ULP complaints to enforce and increase the SSA's payments with the FLRA. Complaints have issued and hearings (or stipulated facts) have been held, and the ALJ has upheld the ULP charges filed by AFGE on all counts. The ALJ found that SSA: (1) underpaid AFGE bargaining unit members by failing to use actual records to compute backpay and by using erroneous payroll calculations; (2) improperly offset leave against overtime; (3) failed to follow the arbitrator's direction on the calculation of "suffer or permit" overtime; and (4) failed to use reasonable methods to contact former employees due overtime. The agency exceptions to the ALJ decision were dismissed in toto by the FLRA in 53 FLRA No. 87. In late 7-98, the AFGE (with the approval of the Council) negotiated with the Agency for full payment of its FLSA overtime obligations to the AFGE bargaining unit. **SSA will pay AFGE bargaining unit members $151,300,000**. **AFGE believes that this payment of $151,300,000 is the largest litigation victory in the sixty-year history of the FLSA.** Most payments pursuant to this agreement were made to the AFGE bargaining unit in late 9-98. A claims process for "suffer or permitted" overtime is currently taking place in the Agency, under the terms of the agreement with SSA. SSA is also using specific methods to locate former employees or survivors of former employees. Pursuant to the 7/98 Settlement Agreement, a Join Labor Management Committee has been meeting in Baltimore for several months working on specific Suffer or Permitted issues. Settlement negotiations ongoing on travel time FLSA overtime.

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. ARFGE is formulating esti-

mate for compensatory time due two plaintiffs; Government is reviewing AFGE's calculations, pending.

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. Awaiting briefing schedule.