

STATUS CALL

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JANUARY–MARCH 2007

Court Preserves CBPO's Seat on City Council

On March 12, 2007, the U.S. District Court for the District of Columbia issued a preliminary injunction to stop Customs and Border Protection (CBP) from requiring CBP Officer Jamie Ramirez to resign his seat on the City Council of Presidio, Texas. *Ramirez v. CBP*, No. 07-CV-65 (D.D.C.). NTEU had filed a lawsuit on January 12, alleging that CBP's order that Ramirez resign violated his First Amendment freedoms.

Ramirez has held a seat on the nonpartisan, volunteer City Council since May 2004. Before running in 2004, he obtained CBP's approval to serve on the Council. CBP, however, reversed course on December 22, 2006. It ordered Ramirez to resign his seat or face removal. The order claimed that Ramirez's service

on the nonpartisan Council created an "appearance of a conflict of interest," even though Ramirez had recused himself from the only issue to arise during his term that even remotely concerned CBP. The order came just three weeks after CBP Headquarters notified its directors of field operations that they would no longer have the authority to approve requests to run in nonpartisan offices, and that all such requests had to be forwarded to headquarters.

Ramirez is an active member of the Presidio community who willingly volunteers his time to a number of civic pursuits. Even the mayor of the city has submitted a declaration to the court on his behalf. Moreover, Ramirez is the latest in a long line of CBP employees (and

employees of its predecessor agencies) to serve on the Presidio City Council. He has a First Amendment right to run for and hold a nonpartisan elected position, the lawsuit alleges, and CBP's order violates that right.

On January 31, 2007, NTEU filed a motion for a preliminary injunction seeking immediate intervention by the Court to block the CBP order from taking effect. After a February 27 hearing, the court issued a decision finding that the imminent injury that Ramirez would suffer if he had to resign far outweighed any harm to CBP in delaying its order pending a full adjudication of the merits. The court set a scheduling conference for April 18 at which the parties will discuss the next steps in the case.

NTEU Challenges Career Intern Program Abuses

On January 24, 2007, NTEU launched legal action against the government-wide Federal Career Intern Program, which allows agencies to circumvent competitive hiring practices. In the lawsuit, NTEU challenges the legality of regulations first issued by the Office of Personnel Management in 2000, and finalized in 2005.

As NTEU points out in the lawsuit, the FCIP rules give agencies excessively broad discretion to depart from the carefully designed and statutorily mandated competitive examination and selection requirements for the federal civil service. They also create a de facto two- or three-year probationary period, instead of the standard one-year period for entry level positions in the competitive service. As a result, many agencies have adopted the FCIP as the hiring method of choice, often at the expense of fair and open competition. In some instances, current

federal employees have been denied opportunities for promotion, and fundamental merit systems principles have been undermined.

The FCIP was designed to be a limited special-focus hiring tool, with the aim of providing structured, two-year training and development "internships." But, because OPM placed very few restrictions on the program, its use has mushroomed. The IRS now fills positions such as Revenue Officer and Revenue Agent using the FCIP; CBP has used FCIP as the exclusive means of hiring new CBP Officers since 2003; and the FDIC has begun filling most entry-level positions using the FCIP. The FCIP therefore threatens to replace the competitive examination process as the primary means of entry into competitive service. As NTEU argues, OPM never established that this "exception" from competitive examination is "necessary" and "justified

by conditions of good administration," as it is required to do by statute. *NTEU v. Springer*, Civil No. 1:07CV00168 (D.D.C.)

SSA IG Withdraws Civil Penalty Actions

Acceding to NTEU's demands, the Office of Inspector General (OIG) of the Social Security Administration (SSA) has ceased its efforts to impose astronomical civil penalties on four employees of the Office of Disability Adjudication and Review (ODAR). The OIG had sought penalties ranging from over \$100,000 to more than \$3.5 million against three bargaining unit ODAR attorneys and the non-attorney director of their hearings office.

The penalty actions stemmed from the employees' use of expert testimony

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NEWS BRIEFS

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NTEU Sues IRS Over Failure to Provide Information on Private Debt Collection Program—On January 19, 2007, NTEU filed a lawsuit against IRS over its failure to respond to a request for information the Union filed last summer under the Freedom of Information Act. *NTEU v. IRS*, No. 07-136 (D.D.C.). The request sought the contracts that IRS entered with the winning private sector contractors, contact information for all other contractors who submitted bids for the work, and documents related to two protests filed by companies who were not selected. Within days of filing the lawsuit, IRS turned over the three contracts. IRS also recently turned over more responsive information. We are assessing whether its response is sufficient.

Arbitrator Grants Grievance over IRS Probationary Employee Form—On March 3, an arbitrator issued a favorable decision stopping IRS' use of a misleading form when it hires employees from an external register. IRS had insisted that all employees hired externally, including current IRS employees, sign a form that purports to waive their adverse action rights during their new probationary period. It imposed this requirement even on employees who, as a matter of law, have adverse action rights because they have completed one year of current continuous service. The arbitrator agreed that the form was not an effective and enforceable waiver of statutory and constitutional due process rights and therefore could not be used, as currently phrased. The arbitrator also found that IRS violated the constitutional due process rights of three employees who had completed a year of service, although they were in their probationary period, when it terminated them without providing them advance notice of the terminations and an opportunity to respond. He therefore ordered their reinstatement.

Important Developments in Overtime Pay for CBP Employees—On March 15, the Federal Circuit issued a favorable decision in a

case involving overtime pay under the Fair Labor Standards Act for 60 named Canine Enforcement Officers. NTEU had participated in the case, both in the lower court and on appeal, as an amicus. The court agreed with our arguments that the CEOs were entitled to FLSA overtime pay for work performed in connection with their canines and weapons. *U.S. v. Bull*, No. 06-5038 (Fed. Cir.). NTEU is currently pursuing claims under the Customs Officer Pay Reform Act (COPRA) for similar overtime work for all legacy Customs Inspectors and CEOs and for CBP Officers. These claims are being handled through the arbitration process. NTEU has consolidated with that arbitration a separate grievance alleging that CBP violated the FLSA in failing to classify CBP Officers as FLSA-nonexempt. Finally, NTEU recently reached a very favorable settlement with respect to CBP's failure to pay Inspectors and CEOs for overtime at the Federal Law Enforcement Training Center (FLETC). It has, however, found it necessary to file another grievance alleging that CBP breached that settlement by failing to process some requests for payment and by failing to provide written confirmation of payment to NTEU, as required by the agreement.

NTEU Files Brief in Support of Whistleblower—On March 14, 2007, NTEU filed an amicus brief in the Federal Circuit in support of the former U.S. Park Police Chief Teresa Chambers. Chief Chambers is seeking review of the determination by the Merit Systems Protection Board that she is not entitled to protection under the Whistleblower Protection Act for comments that she made to the *Washington Post* regarding conditions—inadequate staffing and funding of the Park Police—that she reasonably believed to pose a substantial danger to the public health and safety. NTEU's brief argues that the MSPB erred in limiting whistleblower protection to those who can show that the “illegitimacy” of the agency policy is “not debatable among reasonable people.” *Chambers v. Dept. of Interior*, No. 2007-3050 (Fed. Cir.).

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obtained by an administrative law judge (ALJ) in response to hypothetical and general interrogatories concerning common disabling conditions. The ALJ directed the decision-writers working for him to use the testimony in writing over 700 decisions concerning similar situated disability applicants. Though the OIG acknowledged that the use of general testimony in multiple cases is consistent with SSA policy, it objected to the way the testimony was described in the decisions.

NTEU lawyers represented two of the attorneys and the hearings office director in challenging the penalties, and submitted statements of position on their behalf. NTEU also participated as an amicus curiae on behalf of the fourth employee, who had previously retained private counsel.

On the day that NTEU was granted leave to participate as an amicus in the case involving the fourth employee, the OIG advised NTEU that it would drop the matter entirely. NTEU negotiated an agreement under which the OIG withdrew the allegations of wrongdoing and agreed not to pursue any further action against the employees in any forum.

NTEU had also filed a national grievance over the matter, seeking remedies to protect the bargaining unit from further abuses by the OIG. SSA denied the grievance on March 1, largely on mootness grounds, but NTEU invoked arbitration on March 29. In addition, we are considering whether there are other legal avenues available for challenging the actions of the OIG.