

# National Council Digest

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## President's Message

By Witold Skwierczynski

### ***New Disability Rules: Bad for Claimants, Bad for Employees***

Recently SSA Commissioner Jo Anne Barnhart issued final rules for a new disability appeals process. Agency officials assert that the rules are designed to expedite the current appeals process. Unfortunately, many aspects of these rules raise serious concerns for SSA employees.

The commissioner's plan is designed to reduce the number of claimant appeals and introduce a more litigious system that will reduce the number of individuals who are approved for disability benefits. Her proposals have been implemented with little to no input or negotiations with the union. Despite numerous requests, Commissioner Barnhart and her staff have refused to meet with the Council regarding her disability initiatives.

This is in contrast with previous commissioners (i.e., Apfel and Chater) who viewed employee input as an essential element in designing proposals to improve the disability process. SSA employees who actually take and process disability claims helped design and implement pilots like the Disability Claims Manager (DCM) and the Adjudication Officer (AO) that evidence showed were highly successful in reducing processing time, maintaining and improving quality and providing disability services that were desired by the public.

Unfortunately state DDS resistance and opposition by OHA Administrative Law Judges (ALJs) led SSA to discontinue these pilots. When Commissioner Barnhart undertook her disability reform initiative, she categorically rejected the DCM and AO concepts despite their success. Instead, she decided to implement a process that provides little benefit to the claimant and nothing positive to field office workers.

First she takes a good concept but implements it in a manner that is guaranteed to fail. The good concept is the establishment of a Quick Disability Determination Unit that would adjudicate claims for people who are clearly disabled. The idea is to make decisions on these cases in 20 days or less. Strangely, the commissioner has decided to establish such units in the DDS rather than in field offices. This unnecessary handoff will result in few cases that can be processed with necessary

### INSIDE THIS ISSUE

President's Message	1
Grievances, ULPs, Etc.	2
New Regional Vice President	3
Harassment of Union Representatives	3
Workplace Deaths on the Increase	3
EEO Retaliation	4
Official Time Arbitration on Hold	4

medical records in the 20 day maximum period. This quick processing unit would have made more sense if it was established in the field offices. The DCM showed that CRs can be trained to make disability decisions accurately and quickly. Relationships could be developed much easier with medical providers at the local office level to expedite the dissemination of medical records than to some remote DDS site.

Commissioner Barnhart rejected recommendations from both the union and the Management Association to locate the Quick Disability Decision Unit in the field office. She also rejected the results of claimant surveys that indicate the public prefers a case worker approach where the interviewer is also the disability decision maker. By rejecting these recommendations, Commissioner Barnhart also denied significant promotional opportunities for field employees who would be the most likely candidates for projected GS-12 quick disability decision jobs. It is interesting to note that during the entire Barnhart/Linda McMahon regime, no new bargaining unit promotional job opportunities have been established in field offices.

In order to *streamline* the appeals process, the new regulations eliminate the reconsideration step, which is replaced by a review from a Reviewing Official. Commissioner Barnhart insisted that the Reviewing Officials be attorneys despite union opposition to this qualification. This requirement virtually eliminates any possibility that any field office employees qualify for such jobs. The AO position, which was established in the Disability Redesign pilot of the 1990's, was not required to be an attorney. Consequently, field office employees qualified and were temporarily promoted to these GS-13 jobs.

The AOs and Reviewing Officials perform

*Continued on page 5*

## ***Grievances, ULPs, and More***

### ***ULP Filed on Site Solicitation Change***

Council 220 filed an unfair labor practice over the agency's decision to abrogate the terms of the 1997 partnership agreement on security and site solicitation. SSA failed to provide any notice or opportunity to bargain pursuant to 5 USC 7106. The ULP was filed March 24, 2006.

### ***SSA Files ULP Against Union Representative***

Seattle Regional Vice President Steve Kofahl found himself on the receiving end of a ULP filed by management because he negotiated to impasse over an office relocation and then filed an unfair labor practice against the agency for failing to bargain in good faith. The agency claims that the union is the party who is negotiating in bad faith "by submitting nonnegotiable proposals." The statute does assert that a union may be guilty of an unfair labor practice if it fails to bargain in good faith (5 USC 7116 b5), but it does not define *bad faith bargaining* as arguing with management about what is and is not a negotiable proposal.

### ***TeleService Center Peak v. Non-Peak Days***

Council President Witold Skwierczynski filed a national grievance over the agency's redefinition of peak and non-peak days. This decision also restricted TSRs use of leave at these times. The union stated this to be a clear violation of Article 31, Section 2B of the national contract that requires SSA to make every effort to allow the maximum number of employees to use leave.

### ***Former RVP Faces Suspension***

Former Chicago RVP and current Local 3448 President Mark Denman is facing suspension by management for trying to complete his representational responsibilities. When management tried to assign him to a 13-week training class, he refused to attend when he was advised that he would not be able to perform any of his duties as a local president. When he requested a part time schedule, he was advised that local management did not feel the need to send him to the training class. But, higher level management refuses to approve the part time schedule *until after he attends the class!* Mark must be doing one helluva job as local president if SSA is so intent on getting him out of the way for 13 weeks.

Several grievances have been filed.

### ***Two Official Time Arbitrations in the Works***

Council 220 has already made arguments at arbitration in the official time grievance over SSA's restrictions on official time usage by 50%ers, especially

those who are attending training classes. Management has refused to allow these reps to schedule time that was specifically provided for in the contract. Briefs are to be submitted to the arbitrator shortly.

The second case will be arbitrated this month and involves widespread violations of the contract sections applying to official time including management demands for information beyond the scope of the contract provisions, denials of official time, refusals to reschedule official time, unilateral schedules imposed on union reps, untimely responses, limitations on EEO statutory time and more.

### ***Council Grievance Over MOU Termination***

Another Council level grievance has been filed over the agency's decision to no longer recognize the Memorandum of Understanding on SSA's Administrative Manual System on Health and Safety. The agency claimed these provisions were covered by the new national contract. However, the union argues that the agency offered no evidence to support its allegation. The grievance cites violations of Articles 1, 3, 4, 7 and 24, Section 10. It also charges the agency with committing an unfair labor practice in accordance with 5 USC 7116(a) (1), (5) and (8).

### ***21-day Suspension Reduced***

A Michigan Claims Representative (CR) was suspended for 21-days for "repeated" inappropriate behavior and poor service to the public. The proposal to suspend was issued on November 5, 2004 and was based on the grievant's actions in July 2004 and on October 7. The grievant said that he suffered a head injury that caused impaired memory and a loss of executive function.

At arbitration, the head injury was discounted as a mitigating factor for lack of specific evidence that established a nexus between the impairment and the behavior. But, the arbitrator still reduced the penalty to a 10-day suspension because of due process problems.

The grievant had apologized for his behavior in July and SSA took no disciplinary action. The grievant "was entitled to believe that his apology and his pledge had sufficed and that he would move on in his work without being formally disciplined," the arbitrator said, adding that due process requires timely discipline. "The Employer is not at liberty to resurrect old *offenses* for which the employee was never disciplined."

*James Pikus, Esq., for the union. 106 LRP 17458*

## Updates & Reminders

### *New Regional Vice President*

AFGE Local 1164, which represents New England, has a new president. Richard Couture was recently elected and not only becomes the new head of Local 1164, but is also the new Council 220 Regional Vice President for the Boston Region. He can be reached at c/o SSA 51 Myrtle Street, Worcester, MA. 01608 ([rfcouture616@aol.com](mailto:rfcouture616@aol.com)).

### *Harassment of Union Reps by Charlie Estudillo, Council 220 1<sup>st</sup> VP*

Council 220 has been receiving reports of management attempts to intimidate and harass union representatives. These include management officials confronting union representatives who are on agency time talking to a co-worker about a case and demanding to know if the matter being discussed is union business.

Union representatives do not have to take any abuse, rudeness or harassment from any management officials.

Article 3, Section 3 of our contract requires that all employees will be treated fairly and equitably and that we will be treated “in a professional manner with courtesy, dignity, and respect. To that end, all Social Security employees should refrain from coercive, intimidating, loud or abusive behavior.”

Per 5 USC 7102, “Each employee shall have the right to form, join or assist any labor organization ...freely and without fear of penalty or reprisal....

Additionally, 5 USC 7106 makes it an unfair labor practice “to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter.”

Harassment of union representatives can be addressed as a grievance or a ULP. If a grievance is filed, the ULP can be raised as a part thereof.

You may want to start out filing some grievances that document anti-union harassment and later cite them as evidence and background in a ULP alleging a pattern and practice of harassment.

If the Council sees a significant number of such complaints, we may file a national level grievance or ULP.

## *Death on the Job: Worse than Reported as Latino Job Deaths Soar*

On Tuesday, the AFL-CIO reported the troubling and tragic new figures on workplace deaths documented in the annual [\*AFL-CIO Death on the Job: The Toll of Neglect\*](#) report, which shows for the first time in 10 years the number of workers killed on the job is climbing. Today, we learned the death toll is even worse.

More workers died in 2004 and the number of Latino workers killed on the job is now the highest since 1992.

The original figures in the 15th edition of the AFL-CIO’s [\*Death on the Job: The Toll of Neglect\*](#) were based on numbers from the U.S. Bureau of Labor Statistics (BLS), which is charged with tracking workplace deaths and injuries.

BLS just released [revised numbers](#) and now reports that 5,764 workers were killed on the job in 2004—61 more job deaths than previously reported. The new death toll for Latino workers is now 902, up from the 883 BLS originally reported.

Coming a day before the official observance of [Workers Memorial Day](#), April 28, the sad news that even more workers who were killed on the job must now be remembered in memorial and other services doesn’t change what *Death on the Job* says is the primary reason more workers are dying:

Very simply, workers need more job safety and health protections. The Bush administration’s lack of regulation and increased attention to employer assistance and voluntary compliance comes at the expense of worker safety and health.

By [Mike Hall](#), AFLCIO.org



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## Decisions

### *How to State an EEO Retaliation Claim*

Unfortunately, it is all-too-common that federal employees who complain of discrimination -- even when they are ultimately unable to prove discrimination -- suffer retaliation for having engaged in protected EEO activity.

Fortunately, though, the law provides strong protections for employees who suffer retaliation -- even stronger than the law's protections against other forms of unlawful discrimination.

Stating a basic retaliation claim (that is, a prima facie retaliation case) is easier than stating a discrimination claim, because you only need to allege that the agency took some adverse action against you, or failed to take some action it should have taken to help you, within a short period of time (usually within several months or less) after the acting agency officials learned of your EEO complaint. If you are alleging retaliation, an "adverse action" need not be an "ultimate employment action," but can be any adverse treatment (or denied positive treatment) that is based on a retaliatory motive and is reasonably likely to deter engaging in protected activity. EEOC Compliance Manual, Section 8-II.D.3 (1998); *Passer v. American Chemical Soc.*, 935 F.2d 322, 331 (D.C. Cir. 1991); *Hashimoto v. Dalton*, 118 F.3d 671, 675-676 (9th Cir. 1997).

Thus, for example, canceling an event that would have been held in your honor (as in *Passer*), a diminution in your job responsibilities, placement on a Performance Improvement Plan, or providing less-than-expected performance ratings -- while these may not always be enough to constitute "adverse actions" in underlying discrimination complaints -- may still constitute prohibited retaliatory actions. Any of these could be not-so-subtle ways of sending a message that discourages protected EEO participation.

The D.C. Circuit recently expanded upon the standard from *Passer* for stating an actionable claim of retaliation. *Rochon v. Gonzales*, 438 F.3d 1211, 1216-1218 (D.C. Cir. 2006). In *Rochon*, the court noted that many other circuit courts around the country and the EEOC have adopted a broad standard, like in *Passer*, for stating a retaliation claim, based on the statutory purpose: to provide employees with every incentive to stand up against unlawful discrimination.

The *Rochon* decision also cited the Supreme Court's decision in *Robinson v. Shell Oil Co.*, 519

U.S. 337, 346, 117 S. Ct. 843, 136 (1997), which held that the "primary purpose of anti-retaliation provisions" of the anti-discrimination statutes are to maintain "unfettered access to statutory remedial mechanisms." *Rochon*, supra at 1217.

Based on this reasoning, the D.C. Circuit explained that you can state a claim of retaliation even if you allege that, as a result of your initial EEO complaint, you suffered actions outside the employment context, such as: the IRS retaliating against a complaining employee by subjecting him to a tax audit; an employer falsely accusing an employee of engaging in criminal activity; or, as in *Rochon*, the FBI's failure to investigate a death threat against one of its employees who formerly filed a discrimination complaint (though the FBI normally would have investigated).

You will still have to show that the agency's actions well might have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 1219. However, the continuing evolution of the case law expanding federal employees' ability to state a retaliation claim is a good sign -- that you should feel free to come forward with your discrimination allegations, and that the law will protect from reprisal when you do.

The Supreme Court, on April 18, 2006, heard oral argument on exactly this issue -- what is enough to state a retaliation claim -- in the case *Burlington Northern and Santa Fe Railway Co. v. White*, No. 05-259. A Supreme Court decision is expected by July, which will hopefully provide further support for the position outlined by the D.C. Circuit and the EEOC, among others.

*From FedWeek & Passman & Kaplan, P.C., a law firm dedicated to the representation of federal employees worldwide.*

### *Official Time Arbitration On Hold*

*Arbitrator Barrie Shapiro postponed the official time arbitration set for May 16 and 17 when SSA claimed one of its witnesses was having surgery. The union complained that the agency knew about this arbitration for months and had already delayed the hearing with its dilatory actions, but agreed to a short extension. The union's attorney asked Shapiro to reschedule the hearing in a couple of weeks and if SSA isn't ready, then the union's official time interpretation should prevail until the arbitrator could hear the case.*

## President's Message

*(Cont'd from page 1)*

similar functions. AOs were, however, more claimant-friendly in that they could both reverse an initial DDS denial or assist claimants and attorneys to prepare for hearings in the event the AO decided that a reversal was not warranted. The Reviewing Official (RO) job is designed to have no contact with either the claimants or their attorneys. The RO is required to write a legal brief to either reverse the DDS denial or to uphold it. In the initial implementation of the new regulations in the Boston Region, the RO will not even be located within the Region! They will all be assigned to OHA Headquarters in Falls Church, Virginia. That's about as far removed from claimant-friendly as possible!

Not only are RO jobs (GS-13/14) outside of the scope of promotional opportunities for field office employees, but also Commissioner Barnhart decided to make these positions non-bargaining unit management jobs. This decision was designed to enhance her control over this initiative and to prevent the union from negotiating the establishment of the position.

The new rules require ALJs to write legal rebuttals to the RO legal brief if they decide to reverse the RO decision to uphold the DDS denial of the disability claim. The union believes that this battle of the legal briefs is designed to encourage fewer reversals and, consequently, to reduce the disability benefit rolls.

The new rules provide for a closing of the record that prohibits introducing any additional medical evidence after the ALJ hearings decision. Even if a claimant obtains and produces irrefutable evidence of their disability after the closing of the record, it is inadmissible as evidence in this process. If claimants refile and cite the new evidence, they are ineligible for retroactivity within the scope of the retroactive time frame of the first application. The closing of the record is opposed by many disability advocacy groups, many congresspersons, senators and the union. Despite the overwhelming opposition to this change, Commissioner Barnhart implemented closing of the record with these new regulations. This change appears to be designed to reduce the number of successful appeals.

The new regulations also eliminate the Appeals Council review. This review results in a 30% rate of reversals/remands. Commissioner Barnhart substitutes a small sample review of ALJ decisions. These are selected by SSA. It would appear that a 30% reversal/remand rate is significant enough to retain the Appeals council claimant-initiated appeal. Instead,

Commissioner Barnhart eliminates this appellate option. Claimants are left with an appeal to federal district court if they wish to pursue their case. Not only does the elimination of the Appeals Council review create the distinct possibility that dissatisfied claimants will flood the federal district courts with appeals, but it also jeopardizes hundreds of SSA bargaining unit jobs at the Appeals Council. To this day the commissioner hasn't had the decency to inform potentially displaced workers what jobs, if any, will be left for them.

Of course the real solution to the problem of disability case backlogs is not slicing claimant appellate options but rather to demand more staff for SSA so that the work can be done and backlogs minimized. The commissioner has declined to use her authority under the Independent Agency Act to submit an independent budget request to Congress. SSA deputy commissioners like Linda McMahon thank Congress for the resources that they provide and make no plea for additional staff. The commissioner clings to the president's budget as if it were a biblical text even though it proposes to slash work years at the same time as the agency is getting additional work in Medicare part D, Medicare part B and SSN verification workloads.

There are 55 million Americans with disabilities in the United States. Only 8.3 million are receiving Social Security disability benefits. The program is available to those who can qualify. We don't believe it's in America's best interest to make qualifying more difficult; nor do we believe that the agency should attempt to establish through executive fiat what it can't do legislatively.

Our contacts on Capitol Hill indicate an interest in rewriting the commissioner's regulations or voting not to fund the changes. Either would be a welcome relief for disability claimants. Meanwhile, AFGE will be reminding congress that there are better means to achieve the desired ends of greater productivity and efficiency (e.g., the DCM and AO) and that might also give Field workers higher graded jobs to aspire to.

Unfortunately the commissioner's plan benefits no one except for attorneys who will have Reviewing Official job opportunities and who claimants will be forced to use to have any chance of prevailing in the battle of legal arguments between reviewing officials and ALJs.

*Witold Skwierczynski is President of AFGE Council 220.*