

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF THE AIR FORCE LUKE AIR FORCE BASE, ARIZONA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1547 Charging Party	Case No. DE-CA-01-0959

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JANUARY 12, 2004**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20424

SUSAN E. JELEN
Administrative Law Judge

Dated: December 9, 2003
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: December 9, 2003

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF THE AIR FORCE
LUKE AIR FORCE BASE, ARIZONA

Respondent

and

Case No. DE-CA-01-0959

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1547

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

U.S. DEPARTMENT OF THE AIR FORCE LUKE AIR FORCE BASE, ARIZONA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1547 Charging Party	Case No. DE-CA-01-0959

Phillip G. Tidmore, Esquire
Captain Mark Hoggan, Esquire
For the Respondent

Hazel E. Hanley, Esquire
For the General Counsel

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge filed by the American Federation of Government Employees, Local 1547 (Union) against the U.S. Department of the Air Force, Luke Air Force Base, Arizona (Respondent). On July 25, 2002, the Regional Director of the Denver Region of the Federal Labor Relations Authority (FLRA) issued a Complaint and Notice of Hearing, alleging that the Respondent violated § 7116(a)(1)(2) and (4) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.* (Statute), by failing to grant Harley D. Hembd a performance award for the 2000-2001 performance cycle in retaliation for his protected activities.

A hearing in this matter was held in Phoenix, Arizona. The parties were represented and afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses and file post-hearing briefs. Both the General Counsel and the Respondent filed timely briefs.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law and recommendations.¹

Statement of the Facts

Background Information

The Union is the exclusive representative of a unit of employees at Respondent's facilities. Brock V. Henderson has been President of the Union since January 1998; and Harley D. Hembd was Vice President of the Union from January 1998 until January 2001 when he became the Treasurer. (Tr. 14, 48)

Effective for the appraisal year April 1, 2000 through March 31, 2001, the Respondent moved from a five-tiered performance appraisal system to a pass/fail system. (Tr. 15) The Respondent and the Union negotiated a *Memorandum of Understanding, Managing the Civilian Performance Program AFI 36-1001 dated 1 Jul 99*, signed May 22, 2000. This MOU concerned the Luke Air Force Base supplement to AFI 36-1001. As a result of the MOU, Paragraph 2.7.4 of the final supplement states:

With the available funds in the organization awards program, the Awards Approving Official will grant Performance Awards to all employees who receive an Acceptable rating taking into consideration various circumstances during the rating period. Such circumstances for any exceptions are: disciplinary action, extended sick leave, insufficient award justification, leave without pay, length of time in position, long-term full-time training, and promotion.

(Tr. 16, 17, 20, 37, G.C. Ex. 2, R. Ex. 2, 3)

Harley Hembd is a WG-11 aircraft machinist in the metals technology shop. He has been employed with Respondent since 1985. He works on the day shift, ten hours a day, Monday through Thursday. There are two other WG-11 aircraft machinists in the shop, Craig Trajillo on the day shift and Pete Albico on the night shift. There are also two WG-10 welders in the shop. (Tr. 42)

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The General Counsel's Motion to correct the hearing transcript, to which there was no objection, is granted. The changes are included in this decision at Attachment 1.

Hembd became a Union representative in August 1997. His use of official time has increased each year, from about 20% in the last six months of 1997; 50% during the 1997/1998 appraisal year; 20 to 50% during the 1998/1999 appraisal year; 70 to 80% during the 1999/2000 appraisal year and 70 to 90% during the 2000/2001 appraisal year. (Tr. 45, 49, 51, 53, 54, 59)

M.Sgt. Clinton Bowdry became the superintendent over the Metals Technology Shop in late August 2000. He was Hembd's supervisor from August 2000 through March 31, 2001 of the 2000-2001 performance cycle. He continued as Hembd's supervisor until August 2002, when he was promoted to another position at Respondent's facility. (Tr. 123)

On or about October 16, 2000, Bowdry conducted the mid-cycle appraisals of the five civilian employees in his shop. According to Bowdry he did not actually rate any of the five civilian employees at this time because he had just arrived at Luke Air Force Base and had no knowledge of their work. (Tr. 143)2

During the 2000-2001 appraisal cycle, Hembd was involved in at least five contractual grievances. Two of these grievances were filed on behalf of the Union and the others involved individual issues for bargaining unit employees. Hembd was on official time during his processing of these grievances. (Tr. 71) Hembd also handled at least fourteen Equal Employment Opportunity (EEO) cases and would have been on official time during the processing of these cases. (Tr. 72) One of these EEO cases led to the Union filing an unfair labor practice charge on a formal discussion issue and Hembd was a witness on behalf of the Union at the FLRA hearing on that matter. (Tr. 73)

In November and December 2000, the Union filed two unfair labor practice charges in Case Nos. DE-CA-01-0174 and DE-CA-01-0244. Hembd gave affidavits in support of both charges to the Federal Labor Relations Authority during the 2000-2001 appraisal cycle. The hearing in these cases was

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As a result of an unfair labor practice charge, a decision was issued in *U.S. Department of the Air Force, Luke Air Force Base, Arizona*, Case Nos. DE-CA-01-0174 and DE-CA-01-0244, ALJ Decision Reports, No. 169 (August 21, 2002) (*Luke AFB*). In that decision, I found that, during the October 2000 progress review, Respondent violated section 7116(a)(1) of the Statute, by the conduct of Bowdry in linking the amount of time that Hembd was spending on protected activity with a negative evaluation of his performance.

held after the appraisal cycle ended. (Tr. 72-75) Hembd was also involved in three Merit Systems Protection Board (MSPB) appeals and used official time for such matters. (Tr. 75-76) He also was involved in various negotiations on behalf of the Union during this time period, including use of government travel cars, staffing of the new merit promotion system, the two-tier appraisal system and awards, gym uniforms in the fitness center, Air Force regulations concerning computer use, internet access, email, and accessing personnel folders. He was also involved in negotiating ground rules for the new collective bargaining agreement negotiations. All of this representational activity was handled on official time. (Tr. 76-78)

On April 6, 2001, Hembd received his 2000-2001 performance appraisal. This was his first appraisal under the new two-tier performance system. He received an overall acceptable, with no notation regarding any type of award on the form. (Tr. 62) Both Hembd and Bowdry signed the performance appraisal. In July 2001 Hembd discovered that the other two machinists in his shop, Trujillo and Albico, both received performance awards. Bowdry had given both employees an acceptable rating and had written justifications for performance awards in Part C of their appraisals.

The award justification in Part C for Charles P. Albico stated:

- "-Impeccable and stellar performer who steps up to every challenge in a positive and productive manner
- Masterfully designed and fabricated support and strength gussets for F-16 aircraft canopy cranes
 - Eliminated manufactures design flaw strengthening weak spots--prevented possible catastrophic mishap
- Spearheaded design and manufacture of bearing removal and installation tool for F-16 20MM gun system
 - Superb efforts allowed for bearing replacement while units are still installed on aircraft; saved 3 hours
- Skillfully machined landing gear thrust bushings for Time Compliance Technical Order 1F-16-2050
 - Superior efforts eliminated potential damage to main landing gear shock strut and aircraft main frame
 - Saved the Air Force \$18,292.00 in procurement and replacement cost and numerous hours of down time

-Nominated and selected as Luke Air Force Base
2000 Civilian Leo Marquez Award recipient"

The award justification in Part C for Craig E. Trujillo
stated:

"-A sterling performer and gifted technician has
garnered respect from supervisors and peers alike
-Masterful interaction with depot technicians led to
the completion of depot repair for F-16 aircraft wing
pylons; successfully removed corrosion and sleeve
repaired 11 aircraft; prevented 14 wing changes
-Designed and manufactured intricate tool used to in-
line ream F-16 aircraft rudder mount bushing holes
--Over sized bushing holes to technical data
specifications maintaining critical alignment,
installed over sized bushings; saved 48 hours of
aircraft down time and over \$10,000 in rudder
replacement cost
-Spearheaded design and manufacture of bearing
removal and installation tool for F-16 20MM gun
system
--Superb efforts allowed for bearing replacement
while units are still installed on aircraft; saved
3 hours
-Community minded; volunteers off duty time to
support local church youth group program"

Both employees received a 1.6% award which was \$724.51 each.

Hembd testified that he felt that he deserved a
performance award. Although he was away from the shop on
official time, he did work in the shop that was priority
work and contributed to the shop. (Tr. 94) He never
received any complaints about the quality of his work.
(Tr. 60)

In previous years and under the prior Civilian
Performance and Promotion Appraisal Performance System,
Hembd had received ratings in the high range and
recommendations for performance awards. In the 1996-1997
appraisal cycle, his overall rating was Superior and he was
nominated for a 1.5% performance award. (G.C. Ex. 5) In
the 1997-1998 appraisal cycle, his overall rating was
Superior and he was nominated for a 3.0% performance award.
(G.C. Ex. 6) In the 1998-1999 appraisal cycle, his overall
rating was Superior. He was also nominated for a
performance award, but the percentage is not noted on the
appraisal form. (G.C. Ex. 7) In the 1999-2000 appraisal
cycle, his overall rating was superior and he was nominated
for a 1.67% performance award. (G.C. Ex. 8)

Discussion

General Counsel

Counsel for the General Counsel contends that the Respondent violated section 7116(a)(1), (2) and (4) of the Statute by failing to grant Hembd a performance award during the 2000-2001 performance cycle in retaliation for his protected activities. The General Counsel asserts that the first prong of the analysis set forth in *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*) has been met because the record is replete with Hembd's protected activities. His activities protected by section 7116(a)(2) included representation of unit employees before EEO and MSPB, grievances, bargaining and Union training. His activities protected by section 7116(a)(4) included providing an affidavit during the investigation of Case No. DE-CA-00309, *United States Department of the Air Force, Luke Air Force Base, Arizona*, 58 FLRA No. 131 (on an EEO formal discussion); providing affidavits during the investigation of Case Nos. DE-CA-01-0174 and DE-CA-01-0244 (Luke AFB) (concerning official time and a statement by Bowdry) and testifying at a hearing concerning EEO packets in *United States Department of the Air Force, Luke Air Force Base, Arizona*, 57 FLRA 730 (2002). General Counsel argues that Bowdry knew of the protected activity because he approved or denied Hembd's requests for official time. General Counsel further notes that in *Luke AFB*, a section 7116(a)(1) violation was found in that during Hembd's mid-cycle review, Bowdry told him words to the effect that he was unable to perform satisfactorily because he was at the Union office all the time.³

The General Counsel further argues that the second prong of the *Letterkenny* analysis was established by the un rebutted animus on the part of Hembd's rating official, M.Sgt. Bowdry. The General Counsel asserts that the record establishes Bowdry's hostility to Hembd's Union activity and his use of official time to perform those activities.

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The decision noted "linking the time spent in the Union office with the view that Hembd's performance was deficient suggested to Hembd that Bowdry was penalizing him for the amount of time that he spent on protected activity and would reasonably tend to discourage him from engaging in protected activity in the future. In this latter regard, it was reasonable for Hembd to infer that if he continued to spend as much time as he had on Union activity, Bowdry would continue to view his performance as deficient." *Luke AFB*, at page 14.

The General Counsel further argues that the Respondent has not met its *Letterkenny* burden, first noting that there was no legitimate reason for Bowdry's withholding sufficient justification for an award. Further Respondent never acted to notify Hembd of any alleged problems during the 2000-2001 performance cycle or take any action to timely remedy any deficiencies in performance or conduct. The General Counsel asserts that Respondent is unable to establish that the same action would have been taken even in the absence of Hembd's protected activity.

As remedy, the General Counsel requests a cease and desist order, posting of a notice to employees, and an order requiring that Hembd be made whole, with interest, for the loss of the 2000-2001 award received by similarly situated machinists in the shop.

Respondent

The Respondent argues that although it is undisputed that Hembd engaged in protected activity during the period of time in question, the General Counsel has failed to establish a *prima facie* case that he did not receive a performance award as a result of that activity. Rather the Respondent argues that Hembd's performance as a machinist during the rating cycle was unnoteworthy. Respondent denies that M.Sgt. Bowdry took Hembd's protected activity into consideration but rather gave Hembd the rating he deserved based on his performance as an employee and that performance was not high enough to justify making an award nomination.

Respondent further notes that there was a new performance system in place for the rating cycle and that Bowdry was a new supervisor in the shop. Employees are not guaranteed any type of performance award, and prior receipt of a performance award is not relevant. Further Bowdry rated five civilian employees in the shop, three machinists and two welders. He recommended awards for three of those employees but did not recommend awards for Hembd and one of the welders, citing similar reasons that neither employee did more than the bare minimum in work in the shop.

Respondent argues that even assuming that a *prima facie* case has been established, it has shown that it had a legitimate justification for not recommending Hembd for a performance award, namely that his performance, while meeting the critical performance elements, did not rise to the level of an award. Respondent argues that it would have taken the same action in the absence of protected activity.

Analysis

Section 7102 of the Statute guarantees employees the right to form, join, or assist any labor organization or refrain from such activity without fear of penalty or reprisal. Section 7116(a)(2) of the Statute makes it an unfair labor practice for an agency "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment." Section 7116(a)(4) makes it an unfair labor practice "to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information under this chapter." *United States Department of Justice, Immigration and Naturalization Service*, 51 FLRA 914 (1996).

In *Letterkenny*, the Authority articulated an analytical framework for addressing allegations of discrimination claimed to violate section 7116(a)(2). This framework is also used in addressing allegations of discrimination under section 7116(a)(4). *Department of Veterans Affairs Medical Center, Brockton and West Roxbury, Massachusetts*, 43 FLRA 780 (1991) (*Brockton*). Under that framework, the General Counsel has at all times the overall burden to establish by a preponderance of the evidence that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in connection with hiring, tenure, promotion, or other conditions of employment. *Indian Health Service, Crow Hospital, Crow Agency, Montana*, 57 FLRA 109, 113 (2001) (*Crow Hospital*); *Letterkenny*, 35 FLRA at 118. As a threshold matter, the General Counsel must offer sufficient evidence on these two elements to withstand a motion to dismiss. See, e.g., *Crow Hospital*, 57 FLRA at 113. Whether the General Counsel has established a *prima facie* case is determined by considering the evidence in the record as a whole, not just the evidence presented by the General Counsel. *Department of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 55 FLRA 1201, 1205 (2000).

Satisfying this threshold burden establishes a violation of the Statute only if the respondent offers no evidence that it took the disputed action for legitimate reasons. Where the respondent offers evidence that it took the disputed action for legitimate reasons, it has the burden to establish, by preponderance of the evidence, as an affirmative defense that: (1) there was a legitimate justification for its action; and (2) it would have taken the same action even in the absence of protected activity. See, *United States Air Force Academy, Colorado Springs, Colorado*, 52 FLRA 874, 878-879 (1997); *Federal Emergency Management Agency*, 52 FLRA 486, 490 n.2 (1996); *Letterkenny*, 35 FLRA at 118. The General Counsel may seek to establish that the agency's reasons for taking the action were pretextual.

In this matter, it is undisputed that Hembd engaged in activity protected by the Statute. During the time period in question, Hembd represented unit employees in the parties' grievance procedure, EEO proceedings and MSPB proceedings. He also assisted in the processing of unfair labor practice charges filed by the Union by giving affidavits to the FLRA and by testifying at hearings on the charges. He requested and received official time under the parties' collective bargaining agreement on an almost daily basis. His immediate supervisor, M.Sgt. Bowdry, responded

to his requests for official time.⁴ It is further undisputed that the decision not to recommend Hembd for an award based on his performance appraisal affected a condition of his employment.

I find that the General Counsel has established a *prima facie* case of discrimination under both section 7116(a)(2) and (4).

The question then becomes whether the Respondent has established that it took the disputed action in this matter for legitimate reasons, *i.e.*, that there was a legitimate justification for its action and it would have taken the same action even in the absence of protected activity.

Respondent argues that Hembd's performance, while meeting the criteria for an acceptable performance rating, did not meet the standards for a performance award. Respondent raises issue with the quality of Hembd's work, noting deficiencies in work on a Davis nut and a bathtub bracket. Respondent also pointed out that Hembd's description of his own work indicating that he spent most of his time cleaning up the shop and doing various unidentified "small jobs". Essentially Respondent argues that Hembd's performance was unremarkable and that it was his job performance, rather than any protected activity, on which Bowdry based his decision not to recommend Hembd for a performance award.

The evidence in this case shows that Hembd was an active Union official, who was using steadily increasing amounts of official time since 1997. In prior years he had received superior performance ratings and award recommendations. In 2000-2001, however, circumstances changed for Hembd and the machinist shop. First, there was a new performance system, in which ratings changed to an acceptable/not acceptable system. The new awards system indicated that employees who receive an acceptable rating would be granted a performance award, taking various circumstances into consideration, including "insufficient award justification". (Tr. 16, 17, 20, 37, G.C. Ex. 2, R. Ex. 2, 3)

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While there is some conflicting testimony regarding the amount of time Hembd was actually on official time, the evidence clearly shows a use of official time on a daily basis. I do note that Hembd's estimates of his official time usage appear exaggerated when compared with actual time and attendance records. However, there is no doubt that he spent in excess of 50% of his time away from the shop on official time.

Second, the machinist shop had a new supervisor, M.Sgt. Bowdry. There were five civilian employees in the shop, three machinists and two welders. Although the General Counsel asserts that the machinists and welders cannot be compared since they are different grades and perform different work, I find this argument unconvincing. Both machinists and welders work together in the shop and have similar functions. There is no evidence that both groups of employees were not treated similarly with regard to work assignments and general supervision.

All three machinists were given acceptable performance ratings and two of the three were also given awards, but not Hembd. Both welders were also given acceptable performance ratings, but only one was given an award. Bowdry credibly testified that the second welder was not given an award because he only did a bare minimum of work and his work did not justify an award.

The record evidence reflects that Hembd and Bowdry did not have an easy relationship, but Hembd did receive an acceptable rating. While there is little evidence that Bowdry directly confronted Hembd regarding the quality of his work, there is also very little evidence that Hembd did much more than clean up work in the shop, with the exception of a few "critical" jobs. Tech. Sgt. Mark Barber testified that Hembd spent most of his time scraping and cleaning parts to get them ready for the other people in the shop to work on. (Tr. 175) Barber also indicated that at least one time he told Hembd to work on a Davis nut and he disappeared for two hours before returning to do the work. (Tr. 178) While Hembd made some notes regarding the work that he did in the shop, G.C. Ex. 9 contains many vague references to threaded tools, without much explanation of the skill level required for such work. Barber indicated that the employees in the shop make rubberized parts on a continuing basis and they do not require much skill level. (Tr. 174)5

The evidence does reflect that the relationship between Hembd and Bowdry was primarily focused on Hembd's official time, or more specifically on his requests for official time and Bowdry's responses to such requests. Although it is

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I found Bowdry and Barber's testimony on the issue of the work requirements in the shop to be more credible than that of Hembd, whose own records were vague and sketchy. I further credit Bowdry and Barber's testimony regarding the unsatisfactory bathtub brackets.

apparent that Bowdry consistently granted requests for official time, such grants were sometimes delayed.⁶

The General Counsel asserts the record evidence leaves little doubt that Bowdry was upset about the manner in which Hembd was exercising his right to engage in Union activities and this supported the inference that Hembd's manner of exercising his protected rights played a motivating role in the decision to disapprove the award.

However, based on the record evidence as a whole, I find that the Respondent has established that Hembd's performance, while meeting the criteria for an acceptable performance rating, did not meet the standards for a performance award. Therefore I find that Respondent would have taken the same action, *i.e.*, not recommending Hembd for a performance award, even in the absence of protected activity. In that regard, I note that Bowdry treated a similarly situated employee, a welder, the same as Hembd, even though the welder did not have any protected activity. Further, although Hembd had received awards in the past, each performance cycle is different, and this year there was a new supervisor, a new performance system and a different outcome. While there is no doubt that Hembd was engaged in protected activities, and that there was conflict between both Hembd and Bowdry regarding how and when official time would be approved, I do not find that the evidence is sufficient to overcome the Respondent's affirmative defense.⁷

Consequently, it is found that Respondent did not violate section 7116(a)(1), (2) and (4) of the Statute.

Based on all of the above, it is recommended that the Authority adopt the following:

ORDER

It is hereby ordered that the Complaint in

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In the previous decision in *Luke AFB*, I found that Bowdry's action in insisting that Hembd wait until after the morning meeting for a decision on official time requests was covered by the collective bargaining agreement and the Agency had no obligation to bargain over that action. Therefore I recommended that portion of the complaint be dismissed.

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I further note with regard to the section 7116(a)(1) violation set forth in *Luke AFB* that the statement was made in October 2000, six months prior to the receipt of the acceptable 2000-2001 performance appraisal.

DE-CA-01-0959, be and it, hereby is, dismissed in its entirety.

Issued, Washington, DC, December 9, 2003.

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SUSAN E. JELEN
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DE-CA-01-0959, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

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DATED: December 9, 2003
Washington, DC