

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL TREASURY EMPLOYEES UNION)
1750 H Street, NW)
Washington, DC 20006)
(202) 572-5500)

AMERICAN FEDERATION OF GOVERNMENT)
EMPLOYEES, AFL-CIO)
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(202) 639-6415)

NATIONAL FEDERATION OF FEDERAL)
EMPLOYEES, FD1, IAMAW, AFL-CIO)
1016 16th Street, NW)
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NATIONAL ASSOCIATION OF AGRICULTURE)
EMPLOYEES)
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Honolulu, HI 96820-1143)
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Plaintiffs,

v.

TOM RIDGE, SECRETARY)
UNITED STATES DEPARTMENT OF HOMELAND)
SECURITY)
Washington, DC 20528)

KAY COLES JAMES, DIRECTOR)
UNITED STATES OFFICE OF PERSONNEL)
MANAGEMENT)
1900 E Street NW)
Washington, DC 20415-1000)
(202) 606-1800)

Defendants.

CASE NUMBER 1:05CV00201

JUDGE: Rosemary M. Collyer

DECK TYPE: Administrative Agency Revi

DATE STAMP: 01/27/2005

Case No. _____

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

INTRODUCTION

The National Treasury Employees Union, the American Federation of Government Employees, the National Federation of Federal Employees, and the National Association of Agriculture Employees bring this action to secure injunctive relief and a declaration that final regulations posted to the Federal Register on January 27, 2005, by the Secretary of the United States Department of Homeland Security ("the Secretary") and the Director of the United States Office of Personnel Management ("the Director"), are unlawful. Those regulations, purportedly promulgated under the authority of the Homeland Security Act, Pub. L. 107-296, 116 Stat. 2135 (2002) ("HSA"), establish a new human resources management system for the approximately 110,000 civilian employees of the Department of Homeland Security ("DHS" or "Department").

The new regulations strip DHS employees, including tens of thousands of employees that plaintiffs represent, of longstanding statutory rights to bargain collectively and participate through their elected union representatives in decisions that affect them. In place of those rights, the regulations institute a one-sided regime under which the vast majority of important conditions of employment are not subject to negotiation, even as to the impact and implementation of management-initiated changes on such conditions of employment.

Thus, under the new regulations, unions can no longer bargain on behalf of employees concerning the procedures that will be followed when management alters key conditions of employment, including, among many others, how work is assigned, where employees will perform their duties, and whether the work of bargaining unit employees will be contracted out. Further, under the new regime, management possesses an unlimited unilateral right to issue agency-wide directives to take what few matters remain negotiable off the bargaining table, and/or to invalidate provisions of existing collective bargaining agreements. The regulations also vest a Board that is controlled by the Secretary with the authority to adjudicate all claims by the unions that management has violated those few bargaining obligations that the regulations impose on DHS.

When Congress enacted the HSA, it explicitly directed that, in crafting the new system, the Secretary and the Director must "ensure that employees may exercise the right to organize, bargain collectively, and participate through their exclusive bargaining representatives, in decisions which affect them subject to any exclusion from coverage or limitation on negotiability established by law." 5 U.S.C. § 9701(b)(4). Defendants have violated that statutory directive in several respects. The one-sided system described above materially departs from and modifies the limitations on negotiability

established by existing law. Further, the system established by the regulations cannot fairly be characterized as one that "ensures" the right of employees to "bargain collectively" by any reasonable definition of the concept of collective bargaining.

The defendants have also exceeded their statutory authority by purporting to conscript an independent agency, the Federal Labor Relations Authority (FLRA), to serve as an adjudicator of disputes that arise under the new labor relations scheme and by purporting to dictate to that independent agency precisely which disputes it will address and how it will do so. Indeed, the regulations also purport to enlist the FLRA to serve as a rubber stamp for the new DHS internal labor relations board (the "Homeland Security Labor Relations Board"). They do so for the express purpose of manufacturing jurisdiction in the courts of appeals to review decisions of the DHS labor relations board under the courts' pre-existing statutory authority to review decisions of the FLRA.

The FLRA's statutory jurisdiction is limited to matters arising under Chapter 71. See 5 U.S.C. § 7105(a). Further, the FLRA is an independent agency, whose role and functions are not subject to the control of other executive branch agencies, like DHS and OPM. Congress did not confer any jurisdiction upon the

FLRA or the courts of appeals in the HSA; nor did it authorize the defendants to do so by regulation.

The regulations also purport to draft another independent agency, the Merit Systems Protection Board (MSPB), to adjudicate adverse personnel action cases other than those that involve so-called "mandatory removal offenses." Among other things, the regulations purport to dictate a new standard of review for the MSPB to use in such cases, when an employee challenges the severity of the penalty DHS has imposed. Under existing law, provided in Chapter 77 of Title 5, a penalty may be mitigated where the Board finds that it is not a reasonable one. Under the new standard the regulations require the MSPB to follow, DHS' choice of penalty must be upheld, even if it is unreasonable and clearly disproportionate to the alleged offense, unless an employee shows that the penalty is "wholly without justification."

Under the HSA, the Secretary and Director have the authority to modify the adverse action procedures of Chapter 77, but only in order "to further the fair, efficient, and expeditious resolution of matters involving the employees of the Department." 5 U.S.C. § 9701(f)(2)(C). The new standard for mitigation--under which employees may be subjected to penalties that are not reasonable, so long as they are not "wholly

unjustified"--is neither fair nor necessary to further the efficient and expeditious resolution of adverse action cases.

Similarly, the DHS regulations purport to modify rules issued by the MSPB concerning the adjudication of its cases by shortening the time within which an employee may file an appeal, limiting discovery, and providing for summary adjudication of employee challenges to adverse personnel actions, thereby depriving employees of a right to a hearing as provided in the Board's regulations. These provisions of the DHS regulations conflict with Chapter 12 of Title 5 (which the Secretary and the Director may not waive by regulation), and which give the MSPB, not DHS or OPM, the authority to prescribe its own regulations for the adjudication of cases before it. See 5 U.S.C. § 1204(h); see also 5 U.S.C. § 9701(a) (waiver authority limited to Part III of Title V; Chapter 12 is in Part II).

Further, under the regulations, the Secretary and the Director purport to direct the MSPB to sit as an appellate body, reviewing decisions of a DHS panel (the "Mandatory Removal Panel") in cases that involve so-called "mandatory removal offenses." Under Chapter 12 of Title 5, however, the Board lacks the authority to exercise such intermediate appellate jurisdiction because it is empowered only to "take final action" on the matters before it. 5 U.S.C. §1204(a)(1). As noted, the

Secretary and the Director may not waive the provisions of Chapter 12 in creating the new human resources system.

In short, the Secretary and the Director have exceeded their statutory authority, acted arbitrarily and capriciously, and abused their discretion. See 5 U.S.C. § 706. Accordingly, the plaintiffs are bringing this action to enjoin the implementation of these and other illegal provisions, as described below.

JURISDICTION

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

VENUE

2. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff National Treasury Employees Union ("NTEU") is an unincorporated association having its headquarters at 1750 H Street, NW, Washington, DC 20006. Pursuant to Title VII of the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (1978), NTEU is the exclusive bargaining representative of approximately 150,000 federal employees, including approximately 15,000 DHS employees. NTEU represents the interests of these employees by, inter alia, negotiating collective bargaining agreements; arbitrating grievances under such agreements; filing

unfair labor practice charges; lobbying Congress for favorable working conditions, pay, and benefits; and litigating employees' collective and individual rights in federal courts. NTEU brings this action on behalf of itself and its members.

4. Plaintiff American Federation of Government Employees, AFL-CIO ("AFGE"), is an unincorporated association having its headquarters at 80 F Street, NW, Washington, DC 20001. Pursuant to Title VII of the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (1978), AFGE is the exclusive bargaining representative of approximately 600,000 federal employees, including roughly 40,000 DHS employees. AFGE represents the interests of these employees by, inter alia, negotiating collective bargaining agreements; arbitrating grievances under such agreements; filing unfair labor practice charges; lobbying Congress for favorable working conditions, pay, and benefits; and litigating employees' collective and individual rights in federal courts. AFGE brings this action on behalf of itself and its members.

5. Plaintiff National Federation of Federal Employees, FD-1, IAMAW, AFL-CIO ("NFFE"), is an unincorporated association having its headquarters at 1016 16th Street, NW, Washington, DC 20036. Pursuant to Title VII of the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (1978), NFFE is the exclusive bargaining representative of approximately 65,000

federal employees, including about 300 DHS employees. NFFE represents the interests of these employees by, inter alia, negotiating collective bargaining agreements; arbitrating grievances under such agreements; filing unfair labor practice charges; lobbying Congress for favorable working conditions, pay, and benefits; and litigating employees' collective and individual rights in federal courts. NFFE brings this action on behalf of itself and its members.

6. Plaintiff National Association of Agriculture Employees ("NAAE") is an unincorporated association with a mailing address of P.O. BOX 31143, Honolulu, HI 96820-1143. Pursuant to Title VII of the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (1978), NAAE is the exclusive bargaining representative of approximately 2,500 federal employees, including approximately 1,700 DHS employees. NAAE represents the interests of these employees by, inter alia, negotiating collective bargaining agreements; arbitrating grievances under such agreements; filing unfair labor practice charges; lobbying Congress for favorable working conditions, pay, and benefits; and litigating employees' collective and individual rights in federal courts. NAAE brings this action on behalf of itself and its members.

7. Tom Ridge is the Secretary of the Department of Homeland Security. DHS is a cabinet-level agency whose mission

is to lead the unified national effort to prevent and deter terrorist attacks, to protect against and respond to threats and hazards to the nation, to ensure safe and secure borders, to welcome lawful immigrants and visitors, and to promote the free-flow of commerce. As Secretary, Mr. Ridge was charged by Congress with the responsibility for promulgating, jointly with the OPM Director, the regulations that are the subject of this lawsuit. He is sued in his official capacity.

8. Kay Coles James is the OPM Director. As Director, Ms. James was charged by Congress with the responsibility of working jointly with the DHS Secretary to promulgate the regulations that are the subject of this lawsuit. She is sued in her official capacity.

STATEMENT OF CLAIMS

9. The Homeland Security Act provides that, "notwithstanding any other provision of this part" (i.e. Part III of Title 5), the DHS Secretary, in regulations prescribed jointly with the OPM Director, may "establish, and from time to time adjust, a human resources management system for some or all of the organizational units" of DHS. 5 U.S.C. § 9701(a).

10. The HSA requires that any human resources system that the Secretary and Director establish "shall . . . ensure that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions

which affect them, subject to any exclusion from coverage or limitation on negotiability established by law." 5 U.S.C. § 9701(b)(4).

11. Notwithstanding the statutory requirement of 5 U.S.C. § 9701(b)(4) that the new human resources system "ensure" the rights of employees to "bargain collectively," the regulations the Secretary and Director have promulgated effectively give management the authority to unilaterally repudiate existing collective bargaining agreements, by issuing agency-wide directives. The regulations also confer on management the unilateral right to render any matter non-negotiable, through the same device. See DHS Human Resources Management System Regulations ("DHS Regs"), to be codified at 5 C.F.R. §9701.518(d)(1). In short, the collective bargaining obligation established under the regulations is utterly hollow.

12. Even if DHS management chooses not to exercise the broad authority described in paragraph 11 to escape its bargaining obligation entirely, the new regulations drastically circumscribe the scope of matters subject to bargaining. For example, under existing law, the substance of the decisions management makes when it exercises certain enumerated statutory rights is not negotiable but management is required to negotiate over the procedures it will follow when it exercises those rights, and over appropriate arrangements for adversely affected

employees. 5 U.S.C. §7106(b)(2) and (b)(3). The regulations dramatically expand the limitations on negotiability established by law. Under the regulations, employees can no longer bargain over procedures to be followed when management alters key working conditions including, among others, decisions about how work is assigned, decisions about where employees will work, and decisions to contract out employees' jobs. See DHS Regs, to be codified at 5 C.F.R. §9701.511(b). The only situation in which unions are entitled to engage in bargaining over both procedures and arrangements is when management exercises its rights to take a limited range of personnel actions—such as laying off employees, disciplining them, and filling job vacancies. Id. at §9701.511(e). The right to engage in "appropriate arrangements" bargaining in other contexts has been further drastically curtailed by relieving agencies of their obligation to conduct such bargaining prior to making changes in conditions of employment, by imposing the obligation only where the changes will have a "significant and substantial impact" on employees for more than 60 days, and by limiting the kinds of arrangements that are negotiable to situations involving personal hardships or out of pocket financial losses. See DHS Regs, to be codified at 5 C.F.R. §9701.511(e)(2).

13. In addition to dramatically circumscribing the matters subject to bargaining, departing from existing negotiability

law, and providing DHS a unilateral power of repudiation, the regulations collide with Congress' direction to ensure the rights of employees to bargain collectively by transferring responsibility for resolving all negotiability disputes and exceptions from arbitral awards from the Federal Labor Relations Authority to a DHS labor relations board (the "Homeland Security Labor Relations Board"—"HSLRB") which is controlled by the Secretary. Compare 5 U.S.C. §7105(a)(2)(E) with DHS Regs, to be codified at 5 C.F.R. §9701.509(a). The HSLRB would take the place of the FLRA in resolving charges of unfair labor practices concerning the duty to bargain and prohibited work stoppages, resolving disputes over information requests, and resolving bargaining impasses. Id.

14. The regulations provide that decisions of the HSLRB become final unless a party files a request for review with the FLRA within 15 days. See DHS Regs, to be codified at 5 C.F.R. §9701.508(h). After another 15 day period, in which a response must be filed by the party opposing review, the FLRA has 30 days to render a decision, employing a deferential appellate standard of review. Id. The regulations assigned this rubber-stamping role to the FLRA for the sole purpose of manufacturing a basis for the courts of appeals to exercise judicial review over cases arising under the new labor relations scheme.

15. By statute, the FLRA is an independent federal agency whose jurisdiction is limited to the resolution of matters arising under Chapter 71 of Title 5. See 5 U.S.C. § 7105 (a). The HSA does not provide any additional grant of jurisdiction to the FLRA. Nor does the HSA empower the Secretary and the Director to selectively dictate to the FLRA, as an independent agency, which kinds of disputes it will or will not adjudicate and how it will do so. Indeed, the HSA does not even mention the FLRA.

16. Adverse action procedures for executive branch employees are established pursuant to Chapter 12, 5 U.S.C. §§ 1201-1222, and Chapter 77, 5 U.S.C. §§ 7701-7703. The HSA does not permit the Secretary and the Director to waive Chapter 12 (see 5 U.S.C. § 9701(a)), so its provisions, and any regulations promulgated under their authority, remain binding on DHS.

17. Under the DHS regulations, if an adverse action concerns a so-called "mandatory removal offense" ("MRO") the employee may only challenge his removal before an internal DHS MRO board (the "Mandatory Removal Panel"). See DHS Regs, to be codified at 5 C.F.R. §9701.707. The new regulations, however, purport to enlist the MSPB to serve as an intermediate appellate panel in reviewing the decisions of the DHS MRO Board. Id. at §9701.707(c). The regulations confer this power on the MSPB for the express purpose of manufacturing a basis for the court of

appeals for the Federal Circuit to review decisions of the DHS Mandatory Removal Panel, under its authority to review decisions of the MSPB.

18. The assignment of intermediate appellate authority to the MSPB, described in paragraph 17, above, violates Chapter 12 of Title 5. Chapter 12 specifies that the Board has jurisdiction only to "take final action" on the matters before it. 5 U.S.C. § 1204(a). The Board itself has long recognized that this language precludes it from exercising intermediate appellate authority, as the DHS regulations require.

19. Under the DHS regulations, in non-MRO actions, employees may challenge adverse personnel actions taken against them before the MSPB. DHS Regs, to be codified at 5 C.F.R. §9701.706(a). The DHS regulations, however, purport to modify procedures the MSPB has established pursuant to Chapter 12, for the adjudication of its cases, notwithstanding that, as described in paragraph 16, above, the Secretary and the Director are bound by the provisions of Chapter 12. See DHS Regs, to be codified at 5 C.F.R. §9701.706(k). The modifications work to the disadvantage of employees. Among other things, under the regulations, employees have a shorter period of time to file an appeal than is prescribed in the MSPB's regulations (20 days, rather than 30), and the adjudicating officer has only 90 days to render a decision. Id. at §9701.706(k)(1) and (k)(7).

Discovery is more restricted under the DHS regulations. Id. at §9701.706(1). Further, contrary to the MSPB's regulations, the DHS regulations require the MSPB to dispose of employees' cases through summary judgment where a party makes a showing that the material facts are not in dispute. Id. at §9701.706(k)(5).

20. Under the HSA, the Secretary and Director have the authority to modify the adverse action procedures of Chapter 77, but only if the departures from existing law are designed "to further the fair, efficient, and expeditious resolution of matters involving the employees of the Department." 5 U.S.C. § 9701(f)(2)(C).

21. Citing this authority, the regulations purport to change the standard of review that the MSPB must use when an employee challenges the severity of the penalty DHS imposes in a misconduct case that does not involve a mandatory removal offense. Under Chapter 77 of Title 5, a penalty may be mitigated where the Board finds that it is not a reasonable one. Under the new standard, DHS' choice of penalty must be upheld, even if it is an unreasonable one, unless an employee makes a further showing that "the penalty is so disproportionate to the basis for the action as to be wholly without justification." DHS Regs, to be codified at §9701.706(k)(6).

22. The Secretary and the Director have provided no reasoned explanation to justify their decision to abandon the

well-established mitigation standard and substitute the new one set forth in the regulations.

STATEMENT OF INJURIES

23. The unions bring this action on behalf of themselves and the employees they represent. The new regulations injure the union in both capacities.

24. The unions are harmed because the regulations severely restrict their ability to effectively represent their constituents' interests in the DHS workplace. The regulations drastically scale back the unions' rights to negotiate over conditions of employment, including over the impact and implementation of management's exercise of its reserved rights. The regulations give DHS the unilateral authority to refuse to negotiate over any and all conditions of employment and to repudiate any and all collective bargaining agreements. The regulations compromise the unions' ability to obtain objective, third-party review of labor disputes. As a result, the unions' power and influence in the workplace has been diminished.

25. The dilution of the unions' influence and power in the DHS workplace perceptibly impairs their ability to carry out their missions. The new regulations make it more difficult for the unions to represent DHS employees effectively and successfully.

26. The employees that the unions represent have also suffered legal injury. The regulations deny them the opportunity to be represented by their unions in important workplace issues. They permit DHS to act unilaterally on a much broader scope of issues, depriving employees of their voice in the workplace. They also undermine employees' existing rights to secure reversal of unreasonable penalties in the context of adverse action proceedings.

27. The unions and the employees they represent are also injured by the unauthorized exercise of jurisdiction under the new system by the FLRA and the MSPB, and the regulations' effect of diverting those agencies' resources to work on matters arising under the unlawful DHS regulations. This diversion of resources leads to slower processing time for cases, backlogs, and delays in decisions in areas that are properly within the agencies' jurisdiction.

28. The employees the unions represent are also injured by the procedural changes the DHS regulations purport to make in cases brought by DHS employees to the MSPB. The procedures imposed on MSPB by the DHS regulations make it more difficult for DHS employees to develop their cases and present them to the MSPB. They also deprive DHS employees of having a hearing on the merits of the charges against them by making summary judgment available to DHS management.

COUNT 1

29. Plaintiffs reassert and reallege the allegations contained in paragraphs 1 through 28 of this complaint as though contained herein.

30. The Homeland Security Act requires that the new human resources management system "shall . . . ensure that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them subject to any exclusion from coverage or limitation on negotiability established by law." 5 U.S.C. § 9701(b)(4). The regulations to be codified at 5 C.F.R. Part 9701, Subpart E, deny employees these rights because, among other reasons, they do not comport with the limitations on negotiability established by existing law; they exceed those limitations. Further, the regulations do not ensure that employees may bargain collectively because they establish a one-sided regime under which no form of bargaining can be conducted with respect to many of the most important conditions of employment, and under which, in any event, DHS may avoid its bargaining obligations entirely and invalidate existing agreements by regulatory fiat.

31. The regulations are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

COUNT 2

32. Plaintiffs reassert and reallege the allegations contained in paragraphs 1 through 28 of this complaint as though contained herein.

33. The FLRA is an independent agency whose statutory authority is limited to matters arising under Chapter 71 of Title 5. 5 U.S.C. §7105. The DHS regulations purport to direct the FLRA to participate in resolving labor relations disputes under the DHS human resources system, which purports to exempt DHS employees from Chapter 71.

34. The regulations assigning a role to the FLRA in administering the DHS human resources management system are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

COUNT 3

35. Plaintiffs reassert and reallege the allegations contained in paragraphs 1 through 28 of this complaint as though contained herein.

36. Under the HSA, the Secretary and Director have the authority to modify the adverse action procedures of Chapter 77, but only "to further the fair, efficient, and expeditious resolution of matters involving the employees of the Department." 5 U.S.C. § 9701(f)(2)(C).

37. The new standard that the regulation establishes for mitigating penalties--under which employees may be subjected to unreasonable penalties, so long as they are not "wholly unjustified"--is neither fair, nor necessary to further the efficient and expeditious resolution of adverse action cases.

38. The new standard for mitigation is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

COUNT 4

39. Plaintiffs reassert and reallege the allegations contained in paragraphs 1 through 28 of this complaint as though contained herein.

40. Pursuant to 5 U.S.C. § 1204(a), the Merit Systems Protection Board has jurisdiction over the matters before it, only for purposes of taking "final action" on behalf of the United States Government. Under Chapter 12, the MSPB may not assert appellate jurisdiction in the manner prescribed by the regulations. The new regulations purport to require the MSPB to act beyond its statutory jurisdiction by serving as an intermediate appellate panel in reviewing decisions of the DHS MRO Board.

41. The regulations creating an appellate role for the MSPB in cases adjudicated by the DHS MRO Board, are arbitrary,

capricious, an abuse of discretion, and otherwise not in accordance with law.

COUNT 5

42. Plaintiffs reassert and reallege the allegations contained in paragraphs 1 through 28 of this complaint as though contained herein.

43. The MSPB develops procedures on the adjudication of adverse action cases pursuant to its authority under Chapter 12 of Title 5. The Secretary and Director are without authority to alter those procedures and precedent through regulation because the HSA specifically provides that Chapter 12 is not waivable. Nonetheless, the regulations purport to alter the MSPB's procedures by, among other things, shortening the time within which employees may file an appeal, limiting discovery, and authorizing summary disposition of employees' cases.

44. The regulations altering the procedures developed by the MSPB pursuant to Chapter 12 of Title 5 are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

REQUEST FOR RELIEF

WHEREFORE, based on the foregoing, plaintiffs request judgment against the defendant:

A. Declaring invalid and unlawful the DHS regulations to be codified at 5 C.F.R. Part 9701, Subparts E and G, and any related provisions contained at Subpart F;

B. Enjoining the defendants from implementing or taking any other action pursuant to the regulations;

C. Ordering the DHS Secretary and OPM Director to withdraw the regulations and issue new regulations, after appropriate collaboration with the unions, that comply fully with the law;

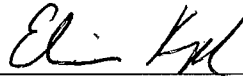
D. Ordering the defendants to pay a reasonable amount of attorney fees and costs as determined by this Court; and

E. Ordering such other and further relief as this Court deems just and proper.

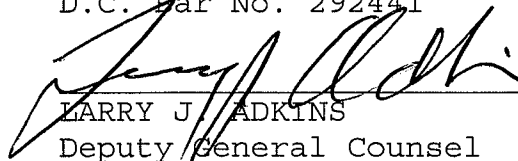
Respectfully submitted,



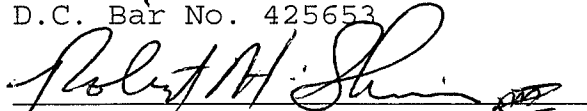
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