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

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, BALTIMORE DISTRICT OFFICE BALTIMORE, MARYLAND Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3614, AFL-CIO Charging Party AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION Respondent	Case Nos. WA-CA-03-0144 WA-CA-03-0182 WA-CA-03-0261
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3614, AFL-CIO Charging Party	Case No. WA-CA-04-0175

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled consolidated case having been submitted to the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this consolidated 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 **October 4,2004**, and addressed to:

Office of Case Control

Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

ELI NASH
Chief Administrative Law Judge

Dated: August 31, 2004
Washington, DC

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

MEMORANDUM DATE: August 31, 2004

TO: The Federal Labor Relations Authority

FROM: ELI NASH
Chief Administrative Law Judge

SUBJECT: EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, BALTIMORE DISTRICT OFFICE BALTIMORE, MARYLAND

Respondent

and Case Nos. WA-CA-03-0144
WA-CA-03-0182
WA-CA-03-0261

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3614, AFL-CIO

Charging Party

AND

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Respondent

and Case No. WA-CA-04-0175

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3614, AFL-CIO

Charging Party

Pursuant to section 2423.27(c) of the Final Rules and Regulations, 5 C.F.R. § 2423.27(c), 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 Motion for Summary Judgment and other documents filed by the parties.

Enclosures

OALJ 04-40

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

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, BALTIMORE DISTRICT OFFICE BALTIMORE, MARYLAND Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3614 Charging Party AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION Respondent	Case No. WA-CA-03-0144 WA-CA-03-0182 WA-CA-03-0261
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3614, AFL-CIO Charging Party	Case No. WA-CA-04-0175

Sandra LeBold, Esquire
For the General Counsel

John F. Sherlock III, Esquire
For the Respondent

Before: ELI NASH
Chief Administrative Law Judge

DECISION ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Statement of the Case

On June 27, 2003, the Acting Regional Director of the Washington Region of the Federal Labor Relations Authority (the Authority) issued a Consolidated Complaint and Notice

of Hearing. That Consolidated Complaint alleged that the Equal Employment Opportunity Commission, Baltimore District Office (Respondent, Baltimore District Office) violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) when on or about December 4, 2002, it conducted two formal discussions within the meaning of section 7114(a)(2)(A) without providing the Charging Party an opportunity to be present. Case Nos. WA-CA-03-0182 and WA-CA-03-0261. On July 31, 2003, the Acting Regional Director of the Washington Region of the Authority issued a Complaint and Notice of Hearing, which alleged that the Respondent, Baltimore District Office violated section 7116(a)(1) and (8) of the Statute when on or about November 13, 2002, it conducted three formal discussions within the meaning of section 7114(a)(2)(A) without providing the Charging Party an opportunity to be present. Case No. WA-CA-03-0144. By order dated October 24, 2003, these three cases were consolidated.

On April 27, 2004, the Acting Regional Director of the Chicago Region of the Authority issued a Complaint and Notice of Hearing, which alleged that the Equal Employment Opportunity Commission (Respondent, EEOC) violated section 7116(a)(1) and (8) of the Statute when on or about January 16, 2004, it conducted two formal discussions within the meaning of section 7114(a)(2)(A) without providing the Charging Party an opportunity to be present. Case No. WA-CA-04-0175. By order dated July 2, 2004, this last case was consolidated with Case Nos. WA-CA-03-0144, WA-CA-03-0182 and WA-CA-03-0261.

The consolidated complaints all concern meetings or telephone conversations with bargaining unit employees conducted by an attorney employed by Respondent EEOC in preparation for arbitration hearings.

Counsel for the Respondents filed three separate Motions for Summary Judgment, arguing that there was no genuine issue of material fact and that the undisputed facts warranted dismissal of the unfair labor practice complaints. The General Counsel opposed the Respondents' Motions for Summary Judgment but submitted its own Cross-Motions for Summary Judgment. Like the Respondent, the General Counsel argued that there was no genuine issue of material fact, however, the General Counsel contended that the undisputed

facts warranted a finding that the Respondents violated the Statute as alleged.[1]

Based on the assertion by both parties that there was no genuine issue of material fact, I issued Orders dated October 24, 2003, and July 2, 2004 respectively, postponing the hearings indefinitely, so that the cross-motions for summary judgment could be ruled on.

Discussion of Motion for Summary Judgment

The Authority has held that motions for summary judgment, filed under section 2423.27 of its Regulations, 5 C.F.R. § 2423.27, serve the same purpose, and are governed by the same principles, as motions filed in United States District Courts under Rule 56 of the Federal Rules of Civil Procedure. *Department of Veterans Affairs, Veterans Affairs Medical Center, Nashville, Tennessee*, 50 FLRA 220, 222 (1995); *Department of the Navy, U.S. Naval Ordnance Station, Louisville, Kentucky*, 33 FLRA 3, 4-5 (1988). The motion is to be granted if the "'pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id. quoting* Rule 56(c). After reviewing the pleadings, affidavits and exhibits submitted by the parties, I agree that there is no genuine issue of material fact with respect to the complaints that constitute the consolidated proceedings before me.

Accordingly, it is unnecessary to hold a hearing in this case, and it is appropriate to decide the case on the cross-motions for summary judgment. Based on the entire record, I will summarize the material facts, and based thereon, make the following conclusions of law and recommendations.

Findings of Fact

It is undisputed that the American Federation of Government Employees, Council 216, AFL-CIO, (AFGE Council 216) is the exclusive representative of a unit of employees at the Equal Employment Opportunity Commission (EEOC). It is also undisputed that American Federation of

[1] Respondents also filed (1) a consolidated opposition to the General Counsel's cross-motions for summary judgment in Case Nos. WA-CA-03-0144, WA-CA-03-0182 and WA-CA-03-0261 and (2) a reply memorandum in support of its motion for summary judgment and in opposition to the cross-motion for summary judgment in Case No. WA-CA-04-0175.

Government Employees, Local 3614, AFL-CIO (Charging Party/ Union) is an agent of AFGE Council 216 for the purpose of representing employees within the bargaining unit at EEOC.

At all times material, James Sober was an attorney employed in the Office of Legal Counsel of Respondent EEOC. The Office of Legal Counsel represents Respondent EEOC in matters involving grievances that proceed to arbitration.

Case Nos. WA-CA-03-0182 and WA-CA-03-0261

Sober was the Respondents' representative in a matter that was scheduled for an arbitration hearing on December 16, 2002. In preparation for that arbitration hearing, Sober visited Baltimore in early December 2002. After meeting with managers employed at the Baltimore District Office, Sober had individual meetings with James Norris and Diane Shaw, two bargaining unit employees who had been identified as potential Union witnesses in the upcoming arbitration. Sober initiated the meetings with Norris and Shaw by simply appearing at their respective offices without any advance notice. When he arrived at each of their offices, Sober introduced himself to Norris and Shaw as a representative of the agency in the upcoming arbitration hearing and advised each employee that they did not have to speak with him. Norris and Shaw each agreed to talk to him and Sober proceeded to ask them questions related to the matter involved in the upcoming arbitration. Each meeting occurred in the office of the employee being questioned with no one other than Sober and the employee present. Each meeting lasted less than 15 minutes. Sober made notes regarding the interviews either during or after the meeting but made no other record of what transpired at the meetings.[2] Sober had no supervisory relationship with either Norris or Shaw.

Case No. WA-CA-03-0144

The events involved in this case relate to Sober's preparation for the same December 16 arbitration hearing as discussed above. Sober was required to submit a listing of potential agency witnesses to the arbitrator on or before November 16, 2002. In conjunction with that deadline, Sober

[2] Along with its motion for summary judgment, Respondent submitted an affidavit from Sober to which a copy of the notes that Sober made was attached. Those notes were on a listing of prospective Union witnesses contained in an arbitration-related submission that the Union had served on Sober and consisted of short, marginal notations.

placed telephone calls to three bargaining unit employees assigned to the Baltimore District Office—Christie Boyd, Bruce Kagen and Suzanne Kotrosa. When Sober was unable to reach at least two of the employees on his first attempt, he left voice-mail messages for them and they returned his call. Prior to his initial attempt to reach them by telephone, Sober did not notify the employees that he wished to speak with them. Once he made contact with each employee, Sober identified himself and stated his purpose in calling.[3] Sober did not insist that any of the three talk to him. In fact, Sober stated that he did not interview other employees whom he contacted in an effort to determine their potential as witnesses who chose not to speak to him. During his telephone conversations with each of the three employees, Sober asked questions that the employees answered and the employees asked questions that Sober answered.

No one was present with Sober when he conducted his conversations with the three employees. Sober did not know whether anyone was with any of the three employees. According to Sober's affidavit, each of the three interviews was "brief" and he did not recall that any lasted more than

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[3] As set forth in his affidavit submitted with the Motion for Summary Judgment in this case, Sober contacted the employees for the purpose of determining whether any of them would be useful as management witnesses in the upcoming arbitration hearing.

a few minutes.[4] Sober did not recall whether he made notes during his telephone conversations with the three employees but stated that if he did, he did not retain them. Sober did not make any other record of his interviews with the three employees.

Sober has never had any supervisory relationship with any of the three employees.

Case No. WA-CA-04-0175

Sober was serving as the representative of Respondent, EEOC, in an arbitration concerning alleged overtime violations. The arbitration hearing in that particular dispute began on January 21, 2004. On or about January 20, 2004, Sober called two bargaining unit employees, Regina Davis and Edwina St. Rose, by telephone in an effort to finalize the Respondent's list of witnesses for the arbitration hearing. Neither of the calls was scheduled in advance with the two employees and no one other than Sober and the relevant employee was present during either call.

The call to Davis lasted about 5 minutes. During the conversation, Sober introduced himself and made reference to the upcoming arbitration hearing. Although the affidavits of Sober and Davis differ as to the specific questions Sober asked during the call, they agree that there were only a few

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[4] On the question of how long each conversation lasted, the General Counsel asserted in its Response to Respondent's Motion for Summary Judgment and Cross-motion for Summary Judgment that each interview lasted approximately 15 to 30 minutes. In support of this assertion, the General Counsel relied on a letter signed by the Assistant Director of EEOC's Office of Human Resources that was submitted to the Washington Regional Office of the Authority prior to the issuance of the complaint in this case. Although the General Counsel submitted the Assistant Director's letter with its response and cross-motion, it did not submit any affidavits or the like from any of the employees who participated in the calls. Although it appears that the Assistant Director, as contrasted with Sober, lacked first-hand knowledge of the facts with respect to the length of the interviews, it is not necessary to the disposition of this case to determine which account should be credited. In this regard, Sober's imprecise recollection of the length of the interviews is not necessarily inconsistent with the General Counsel's assertion as the two accounts are reconcilable at or near the "approximately" 15-minute end of the estimate proffered by the General Counsel.

and they were related to the arbitration hearing.[5] Sober did not insist that Davis talk to him.

The call to St. Rose lasted about 5 to 10 minutes. Similar to the other conversation, Sober introduced himself, made reference to the arbitration hearing, and sought St. Rose's agreement to speak with him. When St. Rose agreed, Sober asked her questions regarding the matter that was the subject of the upcoming arbitration and she responded.

Sober has never had any supervisory relationship with either Davis or St. Rose. Although Respondent listed both employees as potential witnesses, ultimately, it called Davis as a witness at the arbitration hearing held on January 21 but did not call St. Rose.

With respect to all of the telephone conversations and meetings addressed above, the Respondent did not provide notice to the Union and afford it an opportunity to be represented.[6]

Discussion and Conclusions

Positions of the Parties

From the various submissions relating to the motions and cross-motions for summary judgment in these cases, it is clear that the parties are not in dispute that each of the telephone conversations or meetings between Sober and the various employees that are at issue constituted a discussion between one or more representatives of the agency and one or more bargaining unit employees concerning a grievance within

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[5] According to Sober's affidavit, he "merely" asked Davis about her current grade and salary. According to Davis' affidavit, Sober asked her if Tish Tanner was her supervisor. Davis also stated that she "believed" Sober asked her about her hours of work and if she worked overtime and that he "may" also have asked if she worked during her lunch period.

[6] In his affidavit regarding the Davis and St. Rose telephone conversations, Sober stated that he gave those two employees the option of having the Union present. He acknowledged, however, that he did not give notice to the Union.

the meaning of section 7114(a)(2)(A)of the Statute.[7] Thus, the only issue presented by this consolidated complaint is whether the discussions were "formal" within the meaning of that section.

Although the Respondents and the General Counsel filed separate motions and other documents in the various cases that have been consolidated in this proceeding, the arguments made as to all of the cases are substantially the same. Consequently, I will summarize the parties' arguments collectively rather than setting them out separately as to each case.

The Respondents[8]

The Respondents contend that viewing the discussions in the totality of the circumstances, they were not "formal" within the meaning of section 7114(a)(2)(A) of the Statute. In this regard, the Respondents claim that all of the discussions were brief, not scheduled in advance and not

[7] Although Respondent's Motion for Summary Judgment in Case No. WA-CA-04-0175 indicated that Respondent disputed whether the telephone calls to Davis and St. Rose concerned a grievance, Respondent's subsequent reply memorandum in that case clearly stated that it did not dispute that the conversations concerned a grievance.

[8] In addition to making arguments as to whether the discussions were "formal," the Respondents included arguments addressing the issue of coercive interviews as discussed in the Authority's decision in *Internal Revenue Service and Brookhaven Service Center*, 9 FLRA 930 (1982) (*Brookhaven*). In *Brookhaven*, the Authority addressed two separate and distinct concepts that are often paired in the context of allegations arising from fact-gathering sessions conducted by agency representatives preparing for third-party proceedings. One concept was right to representation at formal discussions under section 7114(a)(2)(A) of the Statute; the other concept was protection of employee rights under section 7102 against coercive interrogation in the context of fact-gathering in preparation for third party proceedings. *See, e.g., Department of the Air Force, F.E. Warren Air Force Base, Cheyenne, Wyoming*, 31 FLRA 541, 545-52 (1988); *Brookhaven*. In the cases now before me, the violations alleged in the complaints are limited to the former concept—formal discussion. There are no allegations that coercive interrogation or questioning occurred. Consequently, the arguments that Respondents put forward pertaining to the latter concept—protection against coercive questioning—are misplaced and need not be addressed.

conducted based on a pre-set agenda. The Respondents maintain that Sober was the only management representative present and that he lacked any supervisory or disciplinary authority over the bargaining unit employees participating. Additionally, the Respondents assert that neither threat nor coercion was used to obtain the participation of the bargaining unit employees. The Respondents point out that during the discussions, each employee was located in his or her own office or other place of his or her own choosing. The Respondents state that no record of the discussions other than notes that Sober may have made was created and that in those instances where Sober made notes, they were minimal and sketchy. The Respondents insist that the discussions were conducted in an informal, cordial, non-threatening and non-coercive manner.

Respondents argue that the discussions were not formal and, consequently, there was no obligation under section 7114(a)(2)(A) to afford the Union the opportunity to be present. Based on this, the Respondents declare that no violation of the Statute occurred and that the consolidated complaint should be dismissed.

The General Counsel

The General Counsel argues that the totality of the circumstances show that the discussions that Sober conducted with the bargaining unit employees that are the subject of the consolidated complaint in this case were formal within the meaning of section 7114(a)(2)(A). In particular, the General Counsel points to the purpose and nature of Sober's interviews as demonstrating formality. The General Counsel asserts that the fact that Sober was seeking information from bargaining unit employees to aid him in the arbitration of grievances being brought by the Union supports a finding that the discussions were formal undertakings with a specific agenda and at which the Union had a significant interest in being present. The General Counsel claims that formality is further demonstrated by the facts that the discussions were planned by Sober and had a structured question and answer format. As put another way by the General Counsel, Sober was not a low-level functionary who engaged employees in impromptu, informal conversations about an inconsequential matter.

The General Counsel maintains that the circumstances involved in these cases are distinguishable from those in *Social Security Administration, Office of Hearings and Appeals, Boston Regional Office, Boston, Massachusetts*, 59 FLRA 875 (2004) (*OHA, Boston*) in which the Authority found that a brief, unscheduled telephone interview of a

unit employee by an agency investigator concerning an EEO complaint was not formal in nature. The General Counsel contends that in *OHA, Boston*, the discussion at issue involved a complaint filed under a statutory process in which the exclusive representative had a limited role. Here, in contrast, the discussions involved the arbitration of grievances under the negotiated grievance procedure, an arena in which the exclusive representative wields exclusive power. Furthermore, it is asserted that the Authority has repeatedly held that interviews of unit employees by management representatives in preparation for arbitration trigger the exclusive representative's rights under section 7114(a)(2)(A) of the Statute.

The General Counsel contends that the Respondents violated section 7116(a)(1) and (8) by failing to comply with section 7114(a)(2)(A). As a remedy, the General Counsel requests that Respondent be ordered to cease and desist and post a notice to employees.

Analysis

Relevant Statutory Provision

Section 7114(a)(2)(A) of the Statute provides:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—
>
> (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment[.]

Elements of Section 7114(a)(2)(A) of the Statute

In order for the exclusive representative to have the right to representation under section 7114(a)(2)(A), all elements of that section must exist. Thus, there must be: (1) a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more unit employees or their representatives; and (4) concerning any grievance or any personnel policy or practices or other general condition of employment. *See, e.g., Luke Air Force Base, Arizona*, 54 FLRA 716, 723 (1998), *rev'd as to other*

matters, 208 F.3d 221 (9th Cir. 1999), *cert. denied* 531 U.S. 819 (2000).

It is not in dispute that the meetings Sober held with Norris and Shaw and the telephone conversations that Sober had with Boyd, Davis, Kagen, Kotrosa, and St. Rose were discussions between a representative of the agency and a bargaining unit employee concerning a grievance. Hence, it is undisputed that three of the four elements of section 7114(a)(2)(A) exist. The only element in dispute is whether the discussions were "formal."

In order to determine whether a discussion is "formal," the totality of the circumstances presented must be examined and the following illustrative factors identified by the Authority as relevant considered: (1) the status of the individual(s) who held the discussion; (2) whether any other management representatives attended; (3) the site of the discussions; (4) how the meetings for the discussions were called; (5) the length of the discussions; (6) whether a formal agenda was established; and (7) the manner in which the discussions were conducted. *See, e.g., U.S. Department of the Air Force, 436th Airlift Wing, Dover Air Force Base, Dover, Delaware*, 57 FLRA 304, 307 (2001), *aff'd* 316 F.3d 280 (D.C. Cir. 2003). These factors are illustrative, and other factors may be identified and applied as appropriate. *See, e.g., United States Department of Energy, Rocky Flats Field Office, Golden, Colorado, 57 FLRA 754, 755 (2002) (Rocky Flats)*.

The meetings were not "formal"

When the discussions that Sober conducted took place, each employee was located in their office or other site of their choosing. Although it cannot fairly be said that the discussions were impromptu, it can be said that they were conducted with no advance notice to the employees—Sober initiated the discussion with each employee by simply showing up at their office or calling them on the telephone. The participation of the employees in the discussions was not mandatory. Sober was the only management representative present and the employee was the only other participant

known to Sober.[9] Sober had no supervisory relationship with the employees but served as the Respondents' legal representative in arbitrations in which the employees were either designated or potential witnesses. The length of the discussions was relatively short, ranging from approximately 5 minutes to approximately 15 minutes. Although no agenda in the formal sense was used, it is clear that Sober's planned agenda was to obtain information from the employees to aid him in preparing for the arbitration hearings. At most, the only record of the meetings kept were sketchy, handwritten notes that Sober made either during or after each discussion. The discussions consisted of an initial introduction by Sober followed by questions and answers.

The Authority has stated that although the purpose of discussions may be considered in determining whether they are formal, the fact that discussions have a formal purpose does not, by itself, demonstrate that the discussions were formal. *See Rocky Flats*, 57 FLRA at 756. Thus, the purpose of the discussion, by itself, does not compel a conclusion that it was formal.

Viewing the totality of the circumstances, I conclude that the discussions at issue in the consolidated complaint in this case were not formal within the meaning of section 7114(a)(2)(A). In particular, it is found each of the discussions was a brief, non-mandatory, one-on-one session that was conducted while the employees were in their offices, without advance notice to the employee, formal agenda or record of any consequence. Additionally, Sober, the sole management representative present, was neither the employees' supervisor nor in their chain of command. Although Sober's purpose in conducting the discussions indicates formality, this feature does not offset the other factors present that suggest informality. *See OHA, Boston*, 59 FLRA at 878 and cases cited therein.

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[9] With respect to the discussions that were conducted by telephone, it is clear from the affidavits of Davis and St. Rose that no one was in their office during the telephone call with Sober. No affidavits were submitted from Boyd, Kagen or Kotrosa and, consequently, it is unknown whether anyone was with them when they spoke with Sober. In any event, I find it would make no difference to the disposition of the case if another employee were present in their office during their conversation with Sober. It would be significant, however, if another management representative had participated in the discussion along with Sober but there is nothing to contradict Sober's statement that this was not the case.

Accordingly, I recommend that the Authority grant the Respondents' motions for summary judgment and dismiss the consolidated complaint. It is, therefore, recommended that the Authority adopt the following:

ORDER

It is ordered that the consolidated complaint in Case Nos. WA-CA-03-0144, WA-CA-03-0182, WA-CA-03-0261, and WA-CA-04-0175 be, and hereby, is dismissed.

Issued, Washington, DC, August 31, 2004.

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ELI NASH
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by Eli Nash, Chief Administrative Law Judge, in Case Nos. WA-CA-03-0144, WA-CA-03-0182, WA-CA-03-0261 and WA-CA-04-0175, were sent to the following parties in the manner indicated:

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CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS:**

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DATED: August 31, 2004
Washington, DC