AFSA AND THE COURTS: THE BRADLEY CASE

Vance v. Bradley (1979) may be the only case dealing with a Foreign Service personnel matter that has ever gone before the U.S. Supreme Court. The case is significant for several reasons, but chiefly for the fact that AFSA — not long after being designated the exclusive bargaining agent for the Foreign Service — chose to argue against a group of employees, rather than on their behalf. In its amicus curiae brief, AFSA agreed with management that the needs of the Foreign Service were distinct from those of other federal government employees, and that Foreign Service members could not claim the same entitlements as employees governed by the Civil Service Act.

As in many cases before the Supreme Court, the factual issue in the Bradley case was narrower than the legal principle involved. A group of Foreign Service employees had sought to have their mandatory retirements from the Service at the age of 60 set aside as discriminatory, on the grounds that Civil Service employees at that time were not subject to mandatory retirement until the age of 70. (By the time the Supreme Court decided the case, mandatory retirement for U.S. civil servants on the basis of age had already been totally abolished at the initiative of octogenarian Rep. Claude Pepper, D-Fla.)

A 1979 SUPREME COURT DECISION KEPT INTACT THE LEGAL FINDING THAT THE FOREIGN SERVICE HAS NEEDS AND CHALLENGES DISTINCT FROM THOSE OF OTHER FEDERAL GOVERNMENT EMPLOYEES.

BY TED WILKINSON

In an 8-1 decision written by Justice Byron "Whizzer" White, the Court decided that Congress could constitutionally set stricter standards for the Foreign Service than for the Civil Service. In doing so, it reversed a district court decision in favor of the plaintiffs that had been supported by amicus briefs by the American Association of Retired Persons, American Federation of Government Employees, Rep. Pepper et al., and the National Council of Senior Citizens.

The argument of the plaintiffs centered on the following elements: many Civil Service employees were serving abroad in Foreign Service positions (the court used an estimate of 5 percent of the total U.S. Civil Service at any given time, as opposed to 60 percent of the Foreign Service); overseas service had no impact on their mandatory retirement age; service abroad was not necessarily more demanding than domestic assignments; and mandatory Foreign Service retirement at 60 violated the due process clause of the Fifth Amendment. In his dissenting opinion, Judge Thurgood Marshall espoused these arguments.

But the majority opinion accepted and reiterated the principal points made by AFSA. In the AFSA amicus brief, General Counsel (at the time) Cathy Waelder argued that the 60-year retirement age was needed to maintain the regular flow-through on which the Foreign Service career system was based, and that Foreign Service personnel had to be prepared for civil wars, areas plagued by unrest, disaster relief, evacuations, and terrorist attacks. As a result, "it was not irrational for the Congress to select age 60 as

the age beyond which fewer employees could withstand the rigors of constant transfers and the stresses which accompany life in another culture, sometimes in a hostile and rapidly changing environment."

In the opinion itself, Justice White found it entirely appropriate that Congress had chosen to "attach special need to high performance in the conduct of our foreign relations," and recalled that Rep. Rogers himself (author of the 1924 Foreign Service Act, commonly known as the Rogers Act) had envisaged a lower Foreign Service retirement age because of the "difficult and unsettling changes" of Foreign Service life. In fact, the Rogers Act included a provision for retirement at the age of 65, which was not changed until the 1946 revision of the act, when it was lowered to 60. White also noted that a relatively early retirement age was not discriminatory in favor of youth "qua youth," but in order to allow regular advancement in the lower and middle ranks of the Service. In this respect the Foreign Service career models were based on the U.S. Navy's, which the Court had already recognized as valid in earlier cases.

Ironically, only two years after the Bradley decision Congress reversed course once again and raised the mandatory Foreign Service retirement age to 65, as it had been from 1924 to 1946, in the Foreign Service Act of 1980 (which took effect in 1981). The change was too late for some if not all of the Bradley plaintiffs, but it presumably took some of the sting out of the adverse Supreme Court ruling for them. Most importantly for the Foreign Service, however, the change in law kept intact the legal finding that the Service has distinct challenges, and that Congress has the right to demand more of it or — in certain cases — to compensate for those demands in ways that do not necessarily parallel Civil Service rules. ■

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