

BUSH ADMINISTRATION ATTEMPTS TO HALT PENSION PLAN FIDUCIARIES' APPEAL IN FEDERAL COURT

Washington, D.C. (January 30, 2002) - The Federal Retirement Thrift Investment Board, which manages the Federal employees' 401(k)-like Thrift Savings Plan (TSP or Plan), today charged the Bush Administration with attempting to thwart the TSP fiduciaries' pursuit and control of a claim for \$350 million in damages from a fraudulent contractor. On January 25, the Department of Justice asked a Federal appellate court not to hear the TSP managing fiduciary's appeal of the dismissal of Mehle v. American Management Systems, Inc.

In seeking to frustrate the managing fiduciary's appeal of the district court decision to the U.S. Court of Appeals, "the Department of Justice is continuing its efforts to stop the Plan fiduciaries from acting independently of the Bush Administration in initiating and maintaining litigation on behalf of the 2.6 million TSP participants", said Roger W. Mehle, Executive Director and managing fiduciary of the \$100 billion Plan. "This is in direct contravention of the law which created the TSP fifteen years ago; the fiduciaries, and only the fiduciaries, may manage the assets of the TSP, including its legal claims. We will demonstrate that to the appellate court, but the Department of Justice is trying to deny us even the opportunity to do so."

Executive Director Mehle, with the unanimous approval of the five presidentially appointed Board members, filed suit against AMS on July 17, 2001, seeking damages for fraud and breach of its contract with the Board to create a new computer-based TSP record keeping system. [The complaint is posted on the Board's Web site, www.frtib.gov.] On November 30, the district court decided that the fiduciaries could not bring the suit without the permission and control of the Department of Justice. This decision, which the Department of Justice urged on the court, flies in the face of the critical and historical independence of the Board and its fiduciaries from any political influence, and was promptly appealed by Mehle. Now the Bush Administration is attempting to stifle the appeal, while again opposing the fiduciaries' independence.

The Employee Thrift Advisory Council, which includes fourteen employee unions and associations, voted unanimously at its January 15, 2002, meeting to file an *amicus curiae* brief supporting the Board's legal position in the appellate proceeding that the Department of Justice is trying to terminate. Council Chairman Vincent R. Sombrotto, who is also President of the National Association of Letter Carriers, in a November 19, 2001, letter to Attorney General John Ashcroft, had already advised that "keeping politics out of the TSP is crucial to maintaining the high level of trust that participants have in the Plan."

"Bush Administration officials at the Department of Justice seem intent on obstructing and opposing the independent litigating authority of the Plan," said Mehle. "On behalf of the millions of current and future Plan participants, including the 2.7 million members of the uniformed services now eligible to join, the five Board member fiduciaries and I cannot allow that to be successful."

Since the TSP's creation over 15 years ago, the fiduciaries' insulation from political pressure and their unique fiduciary responsibility to act solely in the interest of Plan participants have been fully accepted by past administrations and congresses alike. Indeed, in its December 21, 2001, final report [page 55], the President's Commission to Strengthen Social Security cites the Board as a model of independence for a proposed privatized Social Security system because of its rigid fiduciary structure, which recognizes that TSP participants, not the Federal Government, own the assets of the Plan:

The TSP Board has a strict fiduciary responsibility to holders of individual TSP accounts. Neither the Congress nor the President controls the Board's budget. The Board appoints a full-time Executive Director who serves as chief executive officer. Each of these six fiduciaries is required to act solely in the interest of plan participants and must have substantial experience, training, and expertise in the management of financial investments and pension benefit plans. These safeguards have helped insure that the TSP remains unwavering to outside political pressures.

"Ironically," said Mehle, "the President's Department of Justice is attempting to undermine the TSP's fiduciary structure at the same time his commission is extolling it. The Department of Justice has told the court that it would represent the TSP in litigation 'without assuming the obligation of a Fund fiduciary

to take into account only the narrow and limited considerations' of their statutory fiduciary duties. Instead, rather than having exclusive loyalty to Plan participants in litigation, the Department of Justice will 'consider interests other than those of the Fund, if necessary' and will 'ensure that the interests of the United States as a whole, as articulated by the [President] are given a paramount position' over those of TSP participants." "I have no doubt", said Mehle, "that this is not what Congress wanted, or wants, for the retirement assets of Federal employees, whether they be money, securities, or legal claims. It should not be what the Administration wants either."

According to Mehle, "The fiduciary structure of the Board is designed to ensure that Plan participants' interests, not those of the President or any other person or group, are given the 'paramount position' in all decisions about their retirement assets. The Board members and I intend to do everything we can to make sure that happens. It would be a breach of our fiduciary duty if we did not."

In that regard, the Board has formally asked the 107th Congress to moot the legal dispute with legislation confirming the fiduciaries' authority to pursue the Board's claims in court independent of any Administration involvement. "We would like to see Congress promptly pass the legislation that the Board has submitted," said Mehle. "It will save needless legal expenses and time and will enable the fiduciaries to bring AMS - and any other wrongdoers against the Plan - to a trial by jury. Such legislation should have the full support of the White House as well, in light of the current nationwide concern about the integrity of 401(k) plan management following Enron's bankruptcy."

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UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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:
ROGER W. MEHLE, :

Plaintiff-Appellant, :

- v. - :

Case No. 01-7191

AMERICAN MANAGEMENT SYSTEMS, INC., :

Defendant-Appellee. :

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**MOTION OF VINCENT R. SOMBROTTO, ET AL.,
FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF**

Vincent R. Sombrotto, President of the National Association of Letter Carriers;
Robert L. Tunstall, Secretary-Treasurer of the American Postal Workers Union; Colleen M.
Kelley, President of the National Treasury Employees Union; Richard N. Brown, President of the
National Federation of Federal Employees; Clifford D. Dailing, Secretary-Treasurer of the
National Rural Letter Carriers Association; Walter M. Olihovik, National President of the
National Association of Postmasters of the United States; Joseph W. Cinadr, President of the
National League of Postmasters of the United States; Ted Keating, Executive Vice President of the
National Association of Postal Supervisors; Michael B. Styles, President of the Federal Managers
Association; Charles Fallis, National Treasurer of the National Association of Retired Federal
Employees; Freda Kurtz, Past President of Federally Employed Women, Inc.; Sandra Sue Adams-
Choate, Assistant General Counsel – Legislation, for the American Federation of Government
Employees; Richard L. Strombotne of the Senior Executives Association and Gary A. Edwards of

the National Association of Government Employees (together, “Movants”) hereby move, pursuant to Federal Rule of Appellate Procedure 29 and Rule 29(b) of the Rules of this Court, for leave to file an *amicus curiae* brief in the above case.

The Movants serve as representatives of various unions and associations of federal and postal employees, associations of federal and postal managers and supervisors, and associations of federal retirees. The members of these organizations constitute the vast majority of the approximately 2.5 million civilian participants in the Thrift Savings Plan (“the Plan”), a 401(k)-like savings plan for federal employees and retirees. *See* 5 U.S.C. §§8431-8440f. The plan savings of these employees and retirees constitute the assets of the Thrift Savings Fund (“the Fund”). *See id.* §§8432, 8437.

The Federal Retirement Thrift Savings Board (“the Board”) establishes policies for the investment and management of the Fund. *See* 5 U.S.C. §8472(f)(1)(A). The Board’s Executive Director, who acts as fiduciary of the Fund, carries out these policies, acting solely in the interest of Plan participants. *See id.* §8474(b)(1).¹

In this case, the Board’s Executive Director, Plaintiff-Appellant Roger Mehle (“Mehle”), sued a contractor, Defendant-Appellee American Management Systems, Inc. (“AMS”), for fraudulently procuring and then breaching a contract with the Board to build a computerized record-keeping system. AMS’s unlawful conduct caused the Fund to suffer an estimated \$50 million in actual damages. The United States District Court for the District of Columbia, in a flawed decision, dismissed for want of subject matter jurisdiction, holding that only the United

¹The Employee Thrift Advisory Council is an advisory committee that advises the Board and its Executive Director concerning the Fund. *See* 5 U.S.C. §8473. Movants make up the majority of the Council.

States Attorney General, not the Board's Executive Director, has authority to bring suit.

On appeal, Mehle seeks to establish that as fiduciary of a fund of private individuals' savings, he necessarily has authority to sue on the Fund's behalf.

Movants have a keen interest in this case as representatives of organizations whose members constitute the vast majority of the Plan's civilian participants. The assets of the Fund are the participants' money, held in trust for them. *See* 5 U.S.C. §8437(g). Thus, Movants have an interest in the Fund's recouping its damages from AMS. Just as important, they have an interest in the legal principle at stake – that as Fund fiduciary, the Board's Executive Director must necessarily have authority to bring suit on behalf of the Fund to protect it and the savings of its millions of participants.

In their *amicus* brief, Movants intend to explain to the Court why, from their perspective, a Fund fiduciary must necessarily have authority, free from political control or influence, to sue on behalf of the Fund and its participants. In particular, Movants will argue that the integrity of a system in which millions of federal workers and retirees place their savings requires that the Fund be represented by a fiduciary who acts solely in the interests of the Plan's participants. The *amicus* brief will argue that in establishing the Plan, Congress did not intend that the ability to sue on its behalf would be left to the sole discretion of a political appointee subject to interests other than those of the Plan participants.

For these reasons, Movants request leave to file an *amicus curiae* brief.

Dated: February 7, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served true copies of the Motion Of Vincent R. Sombrotto Et Al. For Leave To File *Amicus Curiae* Brief, along with the Rule 26.1 Disclosure Statement, this 7th day of February, 2002, by U.S. Express Mail, postage prepaid, upon:

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