

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

MEMORANDUM

DATE: July 30, 2003

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

Respondent

and

Case No. BN-CA-02-0206

ASSOCIATION OF ADMINISTRATIVE
LAW JUDGES, a/w INTERNATIONAL
FEDERATION OF PROFESSIONAL AND
TECHNICAL ENGINEERS

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

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

| | |
|--|------------------------|
| SOCIAL SECURITY ADMINISTRATION OFFICE OF HEARINGS AND APPEALS Respondent | |
| and ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, a/w INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS Charging Party | Case No. BN-CA-02-0206 |

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 his 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. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **SEPTEMBER 2, 2003**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, Suite 201
Washington, DC 20424-0001

PAUL B. LANG
Administrative Law Judge

Dated: July 30, 2003
Washington, DC

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

| | |
|--|------------------------|
| SOCIAL SECURITY ADMINISTRATION OFFICE OF HEARINGS AND APPEALS Respondent | |
| and ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, a/w INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS Charging Party | Case No. BN-CA-02-0206 |

Gary J. Lieberman
For the General Counsel

Cathy Six
For the Respondent

Marilyn Zahm
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge filed by the Association of Administrative Law Judges, a/w International Federation of Professional and Technical Engineers (Union) on December 26, 2001, and amended on May 17, 2002, against the Social Security Administration, Office of Hearings and Appeals (OHA or Respondent). On July 16, 2002, the Acting Regional Director of the Boston Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing alleging that the Respondent committed unfair labor practices in violation of § 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (Statute) by denigrating the activities of Administrative Law Judge (ALJ) Robin Arzt, a member of the

bargaining unit, on behalf of the Union and by removing Judge Arzt from the position of Acting Hearing Office Chief Administrative Law Judge because of those activities.

A hearing was held in New York, New York on April 24, 2003, at which the parties were present with counsel and were afforded the opportunity to present evidence and to cross examine witnesses. This Decision is based upon consideration of all of the evidence, including the demeanor of witnesses, and of the post-hearing briefs submitted by the General Counsel and the Respondent.¹

Positions of the Parties

The General Counsel

The General Counsel maintains that, on June 27, 2001, Judge Louis Zamora, the Hearing Office Chief Administrative Law Judge (HOCALJ) of the Respondent's Bronx Hearing Office, called Judge Arzt into his office. At that time and in the presence of Batia Tabiv, the Hearing Office Director (HOD), Judge Zamora spoke to Judge Arzt in a loud and agitated manner. He told Judge Arzt that she had too many cases in ALPO² and that he wanted her to decide twenty-seven of them in July. He further stated that one of Judge Arzt's claimants had died while awaiting a decision. (Judge Zamora could not identify the claimant that had allegedly died.) Judge Arzt stated that she could not promise to decide that number of cases because she was about to leave for Washington on Union business and had scheduled vacation in July. Judge Zamora referred to Judge Arzt's Union activities³ as "crap". When Judge Arzt left his office Judge Zamora followed her, grabbed her by her arms and told her not to go away mad.

The General Counsel further maintains that, when Judge Arzt returned from Washington on July 2, 2001, she again asked Judge Zamora the name of the claimant who had supposedly died. Judge Zamora still did not know the claimant's name and said that Shirley Dargan, a Legal

1

Although the Union participated in the hearing, it did not submit a post-hearing brief and did not espouse positions other than those of the General Counsel.

2

A case is placed in the ALPO category after the hearing has been held and all evidence has been submitted. A case in ALPO is awaiting a decision by the ALJ to which it has been assigned.

3

Judge Arzt was a Regional Vice President of the Union.

Assistant, had that information. Ms. Dargan told Judge Arzt that she knew of no such claimant. Judge Arzt and Ms. Dargan discussed a claimant who had been terminally ill and whose claim had been expedited. When Judge Arzt told Judge Zamora of her conversation with Ms. Dargan he said that someone had told him that a claimant had died while awaiting a decision.

The General Counsel also alleges that, on July 9, 2001, Judge Zamora informed Judge Arzt that she would no longer be the Acting HOCALJ, a position she had held for about seven years, because someone had complained that there would be a conflict of interest if Judge Arzt ever had to handle a labor dispute when Judge Zamora was out of the office. It is undisputed that the Acting HOCALJ is empowered to perform all of the permanent HOCALJ's duties in his or her absence.

The General Counsel argues that the position of Acting HOCALJ is almost always limited to routine administrative functions such as approving leave. She would, from time to time, have to respond to inquiries from outside of the Hearing Office and would periodically participate in telephone conferences with HOCALJ's from other offices and representatives of the Regional Office. Those conferences were generally devoted to issues concerning work practices and procedures. Therefore, an Acting HOCALJ is not a "supervisor" within the definition of § 7103(a)(10) of the Statute.

The General Counsel maintains that the appointment of Judge Arzt as an Acting HOCALJ is a "condition of employment" as defined in § 7103(a)(14) of the Statute inasmuch as it enhances her status in the eyes of other bargaining unit employees and could be helpful in her career. Her removal from that position was motivated by Judge Zamora's anti-union animus and by her Union activities.

The General Counsel argues that, in view of Judge Zamora's status as a HOCALJ, his actions are attributable to the Respondent. Therefore, the Respondent should be ordered to refrain from statements and actions which would discourage bargaining unit members from exercising their rights under the Statute. Furthermore, Judge Arzt should be offered the opportunity for reinstatement to the position of Acting HOCALJ.

The Respondent

The Respondent maintains that, as HOCALJ, Judge Zamora was responsible for the efficient and timely processing of

disability claims which were assigned to the Bronx Hearing Office. In June of 2001 Ms. Tabiv advised him that Judge Arzt had fifty-six cases in ALPO, which was more than any other ALJ in the Hearing Office. On June 27 Judge Zamora asked Judge Arzt to come into his office. There, in the presence of Ms. Tabiv, he asked Judge Arzt to make decisions on twenty-four of her oldest cases in July. Judge Arzt said that she could not do so because of her responsibilities to the Union and Judge Zamora then asked her if she could at least decide eight cases per week. Judge Arzt became agitated and stormed out of Judge Zamora's office.

The Respondent categorically denies that Judge Zamora followed Judge Arzt and grabbed her. The Respondent also denies that Judge Zamora acted emotionally, denigrated Judge Arzt's Union activities or referred to such activities as "crap". The meeting with Judge Arzt was merely an attempt to expedite the handling of cases. Judge Zamora had held similar meetings with other ALJ's.

Judge Zamora removed Judge Arzt from the position of Acting HOCALJ after careful consideration and consultation with responsible representatives of the Regional Office and with persons who are knowledgeable as to labor relations. Judge Zamora is not anti-union and is, in fact, an associate member of the Union. His action was solely motivated by a sincere belief that Judge Arzt would have a conflict of interest between her responsibilities as a high ranking Union officer and her duties as Acting HOCALJ. The duties are identical to those of the regular HOCALJ and could involve her in labor disputes as an agency representative.

The Respondent contends that, since Judge Zamora had a legitimate reason to remove Judge Arzt from the position of Acting HOCALJ and since he did not display anti-union animus, the Complaint should be dismissed.

Findings of Fact

Background

The Union represents a bargaining unit composed of ALJ's employed by the Respondent. Each ALJ is assigned to a hearing office where he or she adjudicates various types of claims for benefits under the Social Security Act. Each hearing office is headed by a HOCALJ who is in overall charge of its functioning. There is a substantial overlap between the duties of the HOCALJ and that of other ALJ's. The majority of the HOCALJ's time is spent in activities identical to those of other ALJ's. In fact, the Respondent has not promulgated a separate position description for the HOCALJ. The duties of the HOCALJ are set forth in a Revised Amendment to the position description for all of the ALJ's employed by the Respondent (Resp. Ex. 1, p. 7). The HOCALJ is in the same pay grade, AL-3, as the other ALJ's. When a HOCALJ is appointed he or she advances to the next step in the pay grade; if the HOCALJ is already at the highest step there is no increase in pay.

Although the HOCALJ is the first line supervisor of the ALJ's, his or her authority is limited by the provisions of the Administrative Procedure Act which assure judicial independence and exempt ALJ's from the performance reviews that are given to other federal employees. The limited authority of the HOCALJ with regard to ALJ's is recognized in the language of the position description:

The Social Security and Administrative Procedure Acts prohibit substantive review and supervision of the administrative law judge in the performance of his quasi-judicial functions of holding hearings and issuing decisions. . . . He is subject only to such administrative supervision as may be required in the course of general office management (Resp. Ex. 1, p. 4).

The amendment covering the function of the HOCALJ also reflects the distinction between the HOCALJ's authority over ALJ's as opposed to the authority over other personnel in the hearing office:

The HOCALJ has administrative and managerial responsibility for all support staff personnel⁴ in the hearing office, provides leadership and

4

The support staff consists of clerical employees, attorneys, legal assistants and a computer technician. Most of those employees are represented by other unions.

administrative direction to the Administrative Law Judges as may be required in the course of general office management, and has responsibility for the overall management and effectiveness of the hearing office (Resp. Ex. 1, p. 7).

Although the record does not show that the Respondent has established a formal policy or procedure for the temporary replacement of the HOCALJ during his or her absence from the hearing office, it is a universal practice for the HOCALJ to appoint one of the ALJ's as the Acting HOCALJ. The HOCALJ makes the appointment without the need for further approval. The appointment of an Acting HOCALJ is an informal matter that does not involve either paperwork or a pay adjustment. The Acting HOCALJ is apparently appointed on an *ad hoc* basis in certain hearing offices while in others, such as the Bronx Hearing Office, one ALJ is appointed on a more or less permanent basis.

Judge Zamora appointed Judge Arzt as the Acting HOCALJ in the Bronx Hearing Office in 1994. This meant that she would perform the duties of the HOCALJ in his absence.⁵ As a practical matter, this involved signing time sheets and leave slips and occasionally participating in telephone conferences. She would also be available to respond to inquiries from higher levels within OHA or from outside sources. While Judge Arzt was theoretically available to respond to emergencies such as violent incidents involving employees or others, neither she nor Judge Zamora ever had to do so. Furthermore, Judge Arzt was never involved in disciplinary proceedings against an ALJ although she once informally criticized or reprimanded one.

5

Apparently it was not necessary for Judge Zamora and Judge Arzt to coordinate their leave schedules. If both of them were out of the office at the same time another ALJ, whether or not the same one each time, would be chosen to step in.

Judge Arzt's Union Activity

At all times pertinent to this case Judge Arzt was a Regional Vice President of the Union. This meant that she was entitled to take a certain amount of "official time" to conduct Union business at or away from the hearing office. She did not take official time on a set schedule, but would submit leave forms to Judge Zamora as needed. Judge Arzt also considered running for the position of Union Treasurer but later changed her mind.

Judge Arzt's position as a Union official did not excuse her from the normal duties of an ALJ. However, when she was away from the office for prolonged periods she might be counted as only a "partial" judge for that month according to a formula established by the Respondent.⁶

The Meeting of June 27, 2001

On the morning of June 27, 2001, Judge Arzt was preparing to travel to Washington, DC on Union business; her official time had been approved by Judge Zamora. At around Noon on that day Judge Zamora called her into his office in which Ms. Tabiv was also present. The purpose of the unannounced meeting was to discuss the fact that Judge Arzt had 56 cases in ALPO as of the end of the most recent reporting period (GC Ex. 2).⁷ This was a greater number than any other ALJ at that time.⁸ Judge Zamora was especially concerned with the oldest cases and asked Judge Arzt to decide the twenty-four oldest in July, or eight each week.⁹

There is a substantial divergence in the testimony as to the atmosphere of the meeting as well as the actions of Judge Zamora and Judge Arzt. Judge Arzt testified that

6

The number of ALJ's assigned to a hearing office is a factor in the Respondent's analysis of its monthly productivity.

7

Each of the ALJ's in the Bronx hearing office is identified by a four digit number. Judge Arzt's is 1751.

8

Other ALJ's, including Judge Zamora, had at times even greater numbers of cases in ALPO.

9

Under the system in the Respondent's hearing offices the ALJ's are not responsible for drafting their own decisions. After an ALJ indicates whether benefits are to be granted or denied, and presumably the basis for the determination, the case is turned over to one of a number of writers who drafts a formal decision.

Judge Zamora became incensed when she told him that she could not promise to decide those cases in July because of her commitments to the Union and her scheduled vacation. According to Judge Arzt, Judge Zamora referred to her Union activities and to her decisions as "crap." When Judge Arzt left the room Judge Zamora followed her out, grabbed her by the arms and told her not to go away mad.

The testimony of Judge Zamora and Ms. Tabiv is substantially different from that of Judge Arzt. Their recollections are that Judge Arzt became excited and began pacing around the office while making statements to the effect that she could not decide the ALPO cases in July. They agree that Judge Arzt abruptly left the office but deny that Judge Zamora followed her. Furthermore, they deny that Judge Zamora used the word "crap" during the meeting.¹⁰

There is also a divergence of testimony concerning whether Judge Zamora told Judge Arzt that one of her claimants had died while his or her case was still in ALPO. Judge Zamora denied that he made such a statement. Judge Arzt testified that he did mention a claimant who had died waiting for a decision, but did not know the claimant's name. According to Judge Arzt, Judge Zamora told her that her Legal Assistant knew the claimant's name, but when Judge Arzt questioned the Legal Assistant, she denied such knowledge. Ms. Tabiv did not testify on that point.

The evidence as to the events of June 27, 2001, is far from clear. However, after considering all of it, my conclusion is that, while Judge Zamora might have over-reacted when Judge Arzt said that she could not decide eight aged cases a week in July, he did not say anything derogatory about Judge Arzt's activities on behalf of the Union. His actions appear to have been solely the result of a desire to move the oldest cases on Judge Arzt's docket, possibly in response to pressure from higher authority. Judge Zamora's actions were the result of frustration, whether or not justified, over Judge Arzt's refusal to make a commitment to decide eight aged cases during each week in July. Regardless of the propriety of Judge Zamora's conduct, the evidence does not support the proposition that he said or did anything that could reasonably be construed as interfering with, restraining or coercing protected

10

Judge Zamora acknowledged that he has used that word from time to time.

activity within the meaning of § 7116(a)(1) of the Statute.¹¹

The Removal of Judge Arzt as Acting HOCALJ

It is undisputed that, on July 9, 2001, Judge Zamora informed Judge Arzt that he was removing her from the position of Acting HOCALJ because of a perceived conflict with her position as a Union Vice President.¹² Judge Zamora testified that he had considered removing Judge Arzt for some time before but that he had been "too lazy" to do so.

The selection of an Acting HOCALJ is an informal process which does not involve either paperwork or a pay raise. However, the selection of an ALJ for that position enhances his or her prestige in the eyes of the hearing office staff. Furthermore, an appointment as Acting HOCALJ may improve an ALJ's prospects for promotion.

Discussion and Analysis

The Statutory Standards

The Authority has applied an objective standard in determining whether an employer's actions have the coercive effect which is prohibited by § 7116(a)(1) of the Statute. As stated in *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020, 1034 (1994) (*Frenchburg*):

The question is whether, under the circumstances, the statement or conduct would tend to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement.

The criteria for determining whether an employer engaged in discrimination within the meaning of § 7116(a)(2) of the Statute are set forth in *Letterkenny Army Depot*, 35 FLRA 113 (1990) and its progeny. In order to show that

11

Even if Judge Zamora had followed Judge Arzt out of his office and grabbed her by the arms, that conduct, either considered alone or along with other evidence, could not have reasonably been construed as an attempt to discourage her protected activity.

12

Judge Zamora testified that he was also motivated by Judge Arzt's personality problems which had prompted complaints from staff members. However, he did not state that reason at the time of Judge Arzt's removal.

an employer violated this section, the General Counsel must prove by a preponderance of the evidence that the affected employee was engaged in protected activity and that the protected activity was a motivating factor in the employer's decision to take the adverse action.

If the General Counsel presents a *prima facie* case of unlawful discrimination, the employer may show by a preponderance of the evidence that there was a legitimate nondiscriminatory justification for the adverse action and that the action would have occurred even in the absence of the protected activity, *Department of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 55 FLRA 1201, 1205 (2000).

The Respondent has emphasized that Judge Zamora was not motivated by anti-union animus. He was an associate member of the Union and characterized himself as a "Union man." The overall weight of the evidence supports that contention. However, the Respondent's motivation is not a factor in determining whether it violated § 7116(a)(1) of the Statute. The disposition of that issue rests solely upon the nature of the Respondent's actions and the reasonable inference to be drawn therefrom, *Frenchburg, supra*.

The Respondent's motivation may be taken into account in measuring its actions against the standards of § 7116(a)(2) of the Statute. Stated otherwise, the issue of anti-union animus may be relevant to a determination of whether the General Counsel has presented a *prima facie* case of discrimination and, if so, whether the Respondent has effectively rebutted it.

The Events of June 27, 2001

As shown above, even if I were to fully accept Judge Arzt's version of the events of June 27, 2001, it was or should have been clear to her that Judge Zamora acted out of frustration over her refusal to agree to his request that she begin to reduce the number of cases in ALPO by deciding eight cases a week during the month of July. Thus, the Respondent did not violate § 7116(a)(1) of the Statute by virtue of Judge Zamora's actions on June 27, 2001.

Judge Arzt's Removal as Acting HOCALJ

The Respondent has not denied that Judge Arzt was removed as Acting HOCALJ because of a perceived conflict of interest due to her position as a Vice President of the Union. That action, in spite of the Respondent's attempts

to justify it, was a clear violation of § 7116(a) (1) and (2) of the Statute.

Judge Zamora's lack of an anti-union animus is of no consequence under the circumstances of this case. His unequivocal statement of the reason for Judge Arzt's removal can leave no doubt that it was motivated by her protected activity. In relying on the fact that Judge Zamora was not hostile toward the Union in general, the Respondent has misconceived the extent of employee activity that is protected by the Statute. § 7102 of the Statute, entitled "Employees' Rights", states, in pertinent part:

Each employee shall have the right to form, join, or assist any labor organization . . . such right includes the right-

(1) *to act for a labor organization in the capacity of a representative*

(Emphasis supplied.)

The clear meaning of the statutory language is that employees are protected, not only with regard to joining a union, but also in their activities in support of the union. To say that Judge Arzt did not suffer from discrimination because of her membership in and general support for the Union is to beg the question of whether she was discriminated against because she was a Union officer. Judge Zamora has said as much and the Respondent has gone to great lengths in an attempt to justify his rationale.

The Respondent's arguments that the removal was justified are unpersuasive. The conflict of interest upon which the Respondent relies, if it exists at all, is highly conjectural. The Respondent did not challenge Judge Arzt's testimony that, in the approximately seven years during which she was Acting HOCALJ, she never had to represent the Respondent in a labor relations matter and only once informally reprimanded an ALJ.¹³ Rather, her activities as Acting HOCALJ generally involved signing leave requests and time sheets and occasionally participating in conference calls. More sensitive matters could be referred to the Regional Office or could await Judge Zamora's return.

To the extent that the duties of Acting HOCALJ create a conflict of interest, that conflict is equally applicable

13

Judge Zamora testified that he spends only about 30 percent of his time on his duties as HOCALJ and the remainder on his activities as an ALJ.

to all members of the ALJ bargaining unit. In singling out a Union officer, the Respondent is, in effect, saying that it is all right for an ALJ to be in a bargaining unit and to join the Union so long as he or she does not take it too seriously or is too active. That proposition falls of its own weight. If a member of the bargaining unit can be treated differently because he or she is a Union officer, then the Respondent would be justified in discriminating on account of the degree of support for the Union or because of attendance at Union functions. It need hardly be said that such action would be prohibited by the Statute.

The Respondent has attached great significance to the fact that the duties and authority of the Acting HOCALJ are identical to those of the permanent HOCALJ. If so, that is by the Respondent's choice. The most obvious cure for the perceived conflict of interest is to remove the authority of *all* Acting HOCALJ's to do anything that would create a conflict other than in the rare emergency in which there is no time either to contact the Regional Office or to defer the matter to the permanent HOCALJ. What the Respondent may not do is to discriminate between bargaining unit members based upon their holding of a Union office or any other protected activity.

The Respondent has placed unwarranted reliance on prior Authority decisions regarding conflicts of interest. In *Navy Public Works Center, Norfolk Naval Base*, 5 FLRA 389 (1981) the Authority held that the employer was justified in refusing to appoint a member of a union's negotiating committee to a *permanent* position as a confidential employee as defined in § 7103(a)(13) of the Statute. This is far different from the instant situation involving appointment as a temporary stand-in for the HOCALJ. Confidential employees are excluded from bargaining units pursuant to § 7112(b)(2). An Acting HOCALJ is not.¹⁴

The Respondent has also cited *Department of Health, Education and Welfare, Region VIII, Denver, Colorado, Social Security Administration, Region VIII, Denver, Colorado and Social Security Administration, Denver District, Denver, Colorado*, 6 FLRA 628 (1981) in which the Authority found that there was an inherent and unresolvable conflict between an employee's position as a union officer and the position

14

In its post-hearing brief the Respondent alluded to the testimony of Raymond R. McKay, a Labor Relations Specialist for the Respondent, who opined that an Acting HOCALJ could, by operation of law, lose the protection of the collective bargaining agreement and the Statute. The Respondent did not cite any additional authority for this proposition.

of EEO Counselor for which he had applied. The Authority's decision was based upon the finding that the EEO Counselor was a neutral mediator between employees and the agency. This, again, was a permanent position with duties that were inherently inconsistent with the employee's duty to the union and its members. There is a clear distinction between the cited case and the instant situation in which the duties of the Acting HOCALJ are both temporary and almost exclusively administrative.

The Respondent's reliance on § 7120(e) of the Statute is also unjustified. The language of that section states that the Statute should not be construed as allowing a management official, a confidential employee or a supervisor to act as a representative of a labor organization if such activity would create a real or apparent conflict of interest. This case involves a diametrically opposite situation in which a union official is purportedly representing management in a position in which the conflict of interest, if any, is far from clear.

In view of the increased stature associated with the position of Acting HOCALJ and its effect on the incumbent's prospects for promotion, the selection of the Acting HOCALJ is a "condition of employment" within the meaning of § 7103 (a) (14) of the Statute.

In conclusion, Judge Arzt's removal as Acting HOCALJ had the reasonably foreseeable effect of discouraging protected activity. Furthermore, her removal constituted unlawful discrimination. The Respondent's action was not justified and would not have occurred were it not for her protected activity. In view of the clearly discriminatory nature of Judge Arzt's removal, it is of no consequence that Judge Zamora was not motivated by anti-union animus.

This Decision should not be construed as prohibiting individual ALJ's from declining to serve as Acting HOCALJ because of a perceived conflict of interest or the Union from barring certain of its representatives from accepting that position for the same reason. The point is that, once having allowed bargaining unit members to serve as Acting HOCALJ, the Respondent may not then single out certain members for different treatment based upon the nature of their activities in support of the Union.

After consideration of the evidence and of the post-hearing briefs of the parties I conclude that the Respondent committed an unfair labor practice in violation of § 7116(a) (1) and (2) of the Statute by removing Judge Robin Arzt from the position of Acting HOCALJ because of her status as an

officer of the Union. Accordingly, I recommend that the Authority adopt the following:

ORDER

It is hereby that paragraph 15 of the Complaint be, and hereby is, dismissed.

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute it is hereby ordered that the Social Security Administration, Office of Hearings and Appeals, shall:

1. Cease and desist from:

(a) Discriminating against Judge Robin Arzt, or any other Administrative Law Judge in the bargaining unit, by removing her from or refusing to appoint her to the position of Acting Hearing Office Chief Administrative Law Judge on account of her position as a union officer or because of any other activity protected by the Statute.

(b) Interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action:

(a) Offer Judge Robin Arzt reinstatement to the position of Acting Hearing Office Chief Administrative Law Judge in the Bronx, New York Hearing Office.

(b) Post at all locations to which bargaining unit members are assigned in Region II copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Regional Chief Administrative Law Judge of Region II of the Central Region and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

(c) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Boston Region, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, July 30, 2003

PAUL B. LANG
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Social Security Administration, Office of Hearings and Appeals, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discriminate against Judge Robin Arzt, or any other Administrative Law Judge in the bargaining unit, by removing her from or refusing to appoint her to the position of Acting Hearing Office Chief Administrative Law Judge on account of her status as a union officer or because of any other activity protected by the Federal Service Labor-Management Relations Statute.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL offer Judge Robin Arzt reinstatement to the position of Acting Hearing Office Chief Administrative Law Judge in the Bronx, New York Hearing Office.

(Agency)

Dated: _____ By: _____
(Signature) Regional Chief
Administrative Law
Judge
of Region II

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Boston Regional Office, whose address is: Federal Labor Relations Authority,

99 Summer Street, Suite 1500, Boston, MA 02110-1200, and
whose telephone number is: 617-424-5731.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. BN-CA-02-0206, were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED NOS:

Gary J. Lieberman
Federal Labor Relations Authority
99 Summer Street, Suite 1500
Boston, MA 02110-1200

7000 1670 1175 2218

Cathy Six
SSA, OLMER
2355 Annex Building
6401 Security Boulevard
Baltimore, MD 21235

7000 1670 1175 2225

Judge Marilyn Zahm
AALJ, IFPTE
Office of Hearings and Appeals
300 Pearl Street, 4th Floor
Buffalo, NY 14202-2504

7000 1670 1175 2232

REGULAR MAIL:

The Honorable Robin Arzt
Administrative Law Judge
Social Security Administration
226 E. 161 Street
Bronx, NY 10451

Dated: July 30, 2003
Washington, DC